

PROCEDURAL AND SUBSTANTIVE  
LAND MANAGEMENT TECHNIQUES  
OF POTENTIAL RELEVANCE FOR  
THE NEW JERSEY PINELANDS

A REPORT TO THE PINELANDS COMMISSION

VOLUME 2

ORGANIZATIONAL, STRUCTURAL AND  
PROCEDURAL ELEMENTS

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By

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ORGANIZATIONAL, STRUCTURAL AND  
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## INTRODUCTION

This is the second of a five-volume study prepared for the New Jersey Pinelands Commission by Ross, Hardies, O'Keefe, Babcock & Parsons. The purpose of the report is to describe and provide a preliminary analysis of land planning and management techniques which have been used, or proposed, in this and other countries. This report serves as a basis for later elements of the Ross, Hardies work program in which, following an additional data-gathering stage, Ross, Hardies will work with the Commission and its staff to narrow the range of planning and management techniques which merit the Commission's consideration and will, as its final work product, draft specific legislation and regulations designed to achieve the goals and purposes of the New Jersey Pinelands Protection Act of 1979.

The first volume of this report is devoted to a summary and analysis of the entire report. In this volume, we present detailed descriptions of a number of state and regional land use programs for the purpose of illustrating the variety of organizational and procedural approaches that can be taken to regional land planning and management. In Volume 3 we discuss a variety of substantive approaches to land use regulation which may be useful in the Pinelands

either as regional regulations or as models for local adoption in response to regional guidelines. Volume 4 analyzes a number of land management programs which are currently used in several foreign countries and draws several lessons for the Pinelands program from this foreign experience. Finally, in Volume 5 we present a preliminary legal analysis of the fundamental constitutional principles which must be accommodated in any land use regulatory program.

## INTRODUCTION

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## CHAPTER 1

### OREGON LAND CONSERVATION AND DEVELOPMENT COMMISSION

#### I. THE PROGRAM

Oregon has long been a leader in the area of innovative land use programs. Senate Bill 100,<sup>1/</sup> passed by the state legislature in 1973, affirmed the belief that the "uncoordinated use of land within [Oregon] threatened the orderly development, the environment of this state and the health, safety, order, convenience, prosperity of the people of [Oregon]."<sup>2/</sup> The Act created the Department of Land Conservation and Development which was to consist of the Land Conservation and Development Commission (LCDC) and a director.<sup>3/</sup> While the program initiated by Senate Bill 100 leaves local units of government with the responsibility of developing comprehensive land use plans for the lands within their jurisdiction, the LCDC is charged with the responsibility of establishing statewide land use planning goals and guidelines<sup>4/</sup> and is to review the comprehensive land use plans and implementing ordinances developed by local units of government to ensure that these local plans and ordinances do not conflict with its statewide land use planning goals and guidelines.<sup>5/</sup> In addition, the LCDC is to designate certain activities as being of statewide significance.<sup>6/</sup> No project which has been designated as an activity of statewide



significance can be undertaken without first obtaining a planning and siting permit from the LCDC.<sup>7/</sup>

## II. THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

Primary responsibility for coordinating the program initiated by Senate Bill 100 lies with the Oregon Land Conservation and Development Commission which is a part of the newly created Department of Land Conservation and Development.<sup>8/</sup> The LCDC is comprised of seven members appointed by the governor, subject to confirmation by the senate.<sup>9/</sup> The governor must appoint one member from each congressional district within the state. The remaining members are to be appointed from the state at large, reflecting the geographic and occupational makeup of the state. At least one member must be an elected city or county official at the time of his appointment.<sup>10/</sup> Members are appointed to four-year terms.<sup>11/</sup>

The LCDC's first responsibility under Senate Bill 100 was to adopt statewide planning goals and guidelines to be used by state agencies and local units of government in preparing and implementing comprehensive plans.<sup>12/</sup> In preparing these goals and guidelines, the LCDC was to consider existing comprehensive plans of local units of government and state agencies in order to preserve "the functional and local aspects of land conservation and development."<sup>13/</sup> The LCDC was to give priority

consideration to (1) lands adjacent to freeway interchanges, (2) estuarine areas, (3) tide, marsh and wetland areas, (4) lakes and lakeshore areas, (5) wilderness, recreational and outstanding scenic areas, (6) beaches, dunes, coastal headlands and related areas, (7) wild and scenic rivers and related lands, (8) floodplains and areas of geologic hazard, (9) unique wildlife habitats, and (10) agricultural land.<sup>14/</sup> These statewide land use goals were not, however, to be land management regulations for specific geographic areas established through designation of areas of critical state concern or direct regulation of land uses of particular properties through a program of planning or siting permits.<sup>15/</sup>

In developing the statewide planning goals and guidelines, the LCDC was to hold at least ten public hearings throughout the state and was to implement any other provision for public involvement developed by the state Citizen Involvement Advisory Committee (discussed below).<sup>16/</sup> After development of the goals and guidelines, but prior to final adoption, the LCDC was required to hold at least one public hearing at which all interested parties would be given an opportunity to comment on the proposed goals and guidelines.<sup>17/</sup> The LCDC is also authorized to periodically revise, update and expand the initial statewide planning goals and guidelines. Any such revisions

can be made only after public hearings have been held as described above.<sup>18/</sup> A total of 19 goals and guidelines were adopted by the LCDC between December, 1974 and December, 1976.

In the introduction to the published version of the goals and guidelines, the LCDC indicates that "the goals are regulations to be followed by citizens and governments. . . . Goals are applied and implemented through a comprehensive plan." While comprehensive plans and implementing ordinances must conform to the planning goals, guidelines are not mandatory. They are merely suggested directions for local governments to consider when developing comprehensive plans and implementing ordinances and applying the goals. The first planning goal is "to develop a citizen involvement program that ensures the opportunity for citizens to be involved in all phases of the planning process." Local governments are charged with the responsibility of preparing and adopting a program for citizen involvement that clearly defines the procedures by which the general public will be involved in the ongoing land use planning process.

The second goal is "to establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions."

Land use plans should include identification of issues and problems for each statewide planning goal and should evaluate alternative courses of action and ultimate policy choices. The required information should be contained in a plan document or in supporting documents. All land use plans and implementation ordinances should be adopted only after public hearing and should be reviewed and revised on a regular basis to take into account changing public policies and circumstances.

The third goal is "to preserve and maintain agricultural lands." These lands are to be preserved by adopting exclusive farm use zones.

The fourth goal is "to conserve forest lands for forest uses." As with agricultural lands, forest lands are to be inventoried by local governments and zoned so that they will be preserved for the production of wood fiber and other forest uses.

The fifth goal is "to conserve open spaces and protect natural and scenic resources." If no conflicting uses for these lands can be identified, they should be managed in such a way as to preserve their original character. If there are conflicting uses, economic, social, environmental and energy consequences of the conflicting uses must be determined and programs developed to achieve the basic goal of conserving open spaces and natural and

scenic resources.

The sixth goal is "to maintain and improve the quality of air, water and land resources of the state." In furtherance of this goal, local governments should assure that waste and processed discharges will not threaten to violate applicable state or federal environmental quality statutes. Discharges must not exceed carrying capacities of such resources, considering long-range needs, or degrade or threaten the availability of these resources.

The seventh goal is "to protect life and property from natural disasters and hazards." Developments which are susceptible to damage from natural disasters should not be located in areas likely to be subject to natural disasters and hazards without first implementing appropriate safeguards so as to minimize risk of injury and loss of life.

The eighth goal is "to satisfy the recreational needs of the citizens of the state and visitors." The requirements for meeting these needs should be planned by the governmental agencies having responsibility for these areas in coordination with private enterprise. These facilities should be available in the appropriate proportions and in the quantity, quality and location consistent with the availability of resources to meet

these requirements.

The ninth goal is "to diversify and improve the economy of the state." In furtherance of this goal, all local comprehensive plans and policies should contribute to a stable and healthy economy in the state. Economic growth and activity should be encouraged in areas that have under-utilized human and natural resource capabilities.

The tenth goal is "to provide for the housing needs of the citizens of the state." Comprehensive plans should encourage the availability of adequate numbers of housing units at price ranges and rent levels commensurate with financial capabilities of Oregonians. Local comprehensive plans should allow for flexibility of housing location, type and density.

The eleventh goal is "to plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as framework for urban and rural development." Provision for key facilities should be included in each comprehensive plan. In order to meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, must be included in each plan.

The twelfth goal is "to provide and encourage a safe, convenient and economic transportation system."

Transportation plans should consider all modes of transportation and should consider the differences in social consequences that would result from utilizing differing combinations of transportation modes. Transportation plans should conserve energy and meet the transportation needs of the disadvantaged.

The thirteenth goal is "to conserve energy." In furtherance of this goal, land and uses developed on the land should be managed and controlled in order to maximize the conservation of all forms of energy.

The fourteenth goal is "to provide for an orderly and efficient transition from rural to urban land use." Urban growth boundaries should be established to separate land suitable for urban development from rural land. These boundaries should be changed only after consideration of a demonstrated need to accommodate long-range urban population growth, need for housing, employment opportunities and livability, maximum efficiency of land uses, environmental, energy, economic and social consequences and several other enumerated factors.

The fifteenth goal is "to protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of the lands along the Willamette River as the Willamette River Greenway." In furtherance of this goal, all local

comprehensive plans must assure that this area is not developed in such a way as to destroy the natural character of the Greenway.

The sixteenth goal is "to recognize and protect the unique environmental, economic and social values of each estuary and associated wetlands." Local comprehensive plans for each such area must provide for appropriate uses (including preservation) with as much diversity as is consistent with the overall classification.

The seventeenth goal is "to conserve, protect, where appropriate develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters." Local authorities are instructed to maintain the diverse environmental, economic and social values of coastal shorelands and water quality in coastal waters and minimize man-induced sedimentation in the estuaries, near shore-ocean waters and coastal lakes.

The eighteenth goal is "to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of the coastal beach and dune



areas." Local comprehensive plans involving these areas should provide for the diverse and appropriate use of beach and dune areas consistent with their ecological, recreational, aesthetic, water resource and economic values. In addition, local governments must consider the natural limitations of these areas for development.

The final goal is "to conserve the long-term values, benefits and natural resources of the near-shore ocean and the continental shelf." Local comprehensive plans involving these areas should give clear priority to the proper management and protection of renewable sources.

All comprehensive plans and any zoning, subdivision or other ordinances or regulations adopted by a city or county to carry out these plans must be in conformity with the statewide planning goals within one year from the date the goals are approved by the LCDC.<sup>19/</sup> To assure that all local comprehensive plans do, in fact, comply with the statewide planning goals, each county governing body must review all comprehensive plans for land conservation and development within that county and advise each local planning authority within the county whether or not its plans are in conformity with the planning goals.<sup>20/</sup> At the request of any city or county, the LCDC may review a local comprehensive plan and any implementing

ordinances to determine whether the local plan is in conformity with the statewide goals. If a local plan is submitted for approval by the LCDC, the Commission must evaluate the plan and related ordinances and either approve or disapprove the plan within 90 days of the date that the request was received unless the Commission finds that, due to extenuating circumstances, a specified period of time greater than 90 days is required to review the plan.<sup>21/</sup> The LCDC's approval or disapproval must include a clear statement of findings setting forth the basis for the approval or disapproval. A request for approval which has not been granted or denied within the time required is to be considered an approval.<sup>22/</sup> The LCDC is also authorized to grant a planning extension to any local government if it finds that the local government is making satisfactory progress towards adoption of a comprehensive plan that will be in conformity with the statewide planning goals.<sup>23/</sup>

The LCDC may, upon petition by any county, city, special district governing body, state agency or individual or group of individuals whose interests are substantially affected, review any comprehensive plan and related ordinances or any land conservation and development action taken by a local governing body to determine whether such action is in violation of the statewide planning goals.

Such a petition must be filed with the Land Use Board of Appeals (discussed below) no later than 30 days after the date of the action complained of. The review by the Board is to be based on the administrative record that is the subject of the review proceeding. The Board provides the LCDC with a summary of the relevant evidence and its recommended decision. The LCDC makes the final decision with respect to issues involving statewide planning goals and the LCDC's decision is included in the Board's final order.<sup>24/</sup>

The LCDC is authorized to issue an order requiring any city, county, state agency or special district to take any action necessary to bring its comprehensive plan or related ordinances into conformity with the statewide planning goals. Such action may be taken if the LCDC finds that any comprehensive plan or related ordinances are not in conformity with the statewide planning goals, a city or county is not making satisfactory progress towards adoption of a satisfactory comprehensive plan after an extension of time in which to adopt such a plan has been granted, or a city or county has no comprehensive plan.<sup>25/</sup> The LCDC may bring an action in the circuit court to enforce compliance with its order.<sup>26/</sup>

The final LCDC responsibility is to designate activities of statewide significance. The statute

specifically authorizes the LCDC to designate the planning and siting of public transportation facilities, public sewage systems, water supply systems, solid waste disposal sites and facilities and public schools as activities of statewide significance if the LCDC determines that this is necessary. The LCDC may recommend to the state legislature that any other activities be designated as being of statewide significance if it deems this necessary.<sup>27/</sup>

If an activity has been designated as being of statewide significance, it may not be undertaken without first obtaining a planning and siting permit from the LCDC.<sup>28/</sup>

When an application for such a permit is received by the LCDC, copies of the application must be transmitted to each affected county, city or state agency for their review and recommendation. If the LCDC finds that the proposed project complies with state regulations for the activity and the comprehensive plan for any city or county involved, it shall approve the application and issue a planning and siting permit. The LCDC may prescribe any conditions or restrictions it considers necessary to assure that the project complies with all applicable regulations and plans.<sup>29/</sup>

III. OTHER AGENCIES INVOLVED IN THE PROGRAM

The LCDC's responsibilities under Senate Bill 100 extend only to adopting statewide planning goals and guidelines and assuring that these goals and guidelines are applied by local governments and state agencies in approving developments which are designated as being activities of statewide significance. Thus, all state agencies which, prior to the adoption of Senate Bill 100, would have been involved in issuing permits for land development will still be responsible for issuing these permits. However, all plans, programs or regulations affecting land use adopted by any state agency must be in conformity with the statewide planning goals.<sup>30/</sup> As noted above, the LCDC is authorized to review any action relating to land use and development taken by a state agency upon petition of any interested party to assure that the action is not in conflict with statewide planning goals<sup>31/</sup> and may order any state agency to bring its regulations into conformity with the statewide planning goals.<sup>32/</sup>

Pursuant to Senate Bill 100, the LCDC must also appoint a State Citizen Involvement Advisory Committee. This committee should be broadly representative of geographic areas of the state and of interests relating to land uses and land use decisions. The function of the committee is to develop a program for the LCDC that promotes

as to the appropriate action to be taken. The LCDC, however, makes the final decision which is included in the Board's order. All final orders of the Board may be appealed to the Oregon Court of Appeals.<sup>35/</sup>

#### IV. LOCAL GOVERNMENT PARTICIPATION

With the exception of development which has been designated as an activity of statewide significance by the LCDC, local governments retain the authority to develop comprehensive land use plans and related ordinances and to determine the type of development to be allowed within their jurisdiction. All local plans and implementing ordinances must, however, be in conformity with the statewide planning goals adopted by the LCDC.<sup>36/</sup> Each county governing body is required to review all comprehensive plans within the county in order to determine whether these comprehensive plans are in conformity with statewide planning goals.<sup>37/</sup> Such reviews shall be made on an annual basis and a report must be made to the LCDC with respect to the status of the comprehensive plans within each county.<sup>38/</sup>

Each county government body is also responsible for coordinating all planning activities affecting land uses within the county to assure an integrated comprehensive plan for the entire area of the county. Counties have no

and enhances public participation in the development of statewide planning goals and guidelines.<sup>33/</sup>

A Local Officials' Advisory Committee is also called for under the Act. This committee is comprised of persons serving as city or county elected officials and its membership should reflect the city, county and geographic diversity of the state. The committee is to advise and assist the Commission on the policies and programs affecting local governments in order to promote mutual understanding and cooperation between the LCDC and local governments in the implementation of statewide planning goals.<sup>34/</sup>

A recently enacted bill created the Land Use Board of Appeals. The Board is composed of up to five members appointed by the governor and confirmed by the senate. Board members will serve until July 1, 1983 when the Board's activities are to be reviewed by the legislature. The Board hears all appeals regarding any land use actions taken by any individual, local government or state agency, including allegations that an action violates a planning goal promulgated by the LCDC. The Board replaces the circuit courts as having original jurisdiction of quasi-judicial land use appeals. If an appeal involves an allegation that a local government action violates a planning goal, the Board will make a recommendation

such responsibility with respect to cities having populations of 300,000 or more. Such cities will exercise the authority vested in counties within their incorporated limits.<sup>39/</sup> Adjacent counties may voluntarily join together for the purpose of carrying out their responsibilities pursuant to Senate Bill 100.<sup>40/</sup> Counties and cities representing 51% of the population in any given area may petition the LCDC for an election in their area to form a regional planning agency to exercise the coordinating authority vested in the county governing bodies. If the LCDC finds that the area described in the petition forms a reasonable planning unit, it may call an election in the area to form such a regional planning agency. The agency is considered established if a majority of the votes favor its establishment.<sup>41/</sup> A voluntary association of local governments can be formed to perform the review, advisory and coordination functions assigned to the counties<sup>42/</sup> by the adoption of a resolution ratified by each participating county and a majority of the participating cities.

V. SUCCESSSES AND FAILURES OF THE PROGRAM

The LCDC has adopted the nineteen statewide planning goals described above and is in the process of reviewing local comprehensive plans to determine whether



they are in compliance with these goals. Two commentators, however, have opined that Senate Bill 100 inadequately defines the goals sought to be achieved by it and, therefore, the apparent "successes" or "failures" of the program will be determined entirely by the quality and philosophies of the members of the LCDC at any given time.<sup>43/</sup> These commentators reason that the nineteen statewide planning goals adopted by the LCDC are so general that it is very difficult for local governments to determine whether their local comprehensive plans are in conformity with these goals.<sup>44/</sup>

A spokesman for the LCDC, however, emphasized that the planning goals were made general by design. The LCDC members and staff are of the opinion that the function of the LCDC is to develop very broad planning goals which will enable local governments to consider all factors relevant to land use within their specific jurisdiction before adopting a comprehensive plan. The legislature, in enacting Senate Bill 100, did not intend to create a system of state level zoning but, rather, intended to provide a means by which a coordinated system of locally developed land use plans could be achieved.<sup>45/</sup>

Despite the fact that all 277 local planning jurisdictions were to have adopted conforming comprehensive plans within one year of the adoption of the planning goals

by the LCDC (most of these goals were adopted by the end of 1974), only about sixty local plans have been approved.<sup>46/</sup> Several local plans which have been submitted for approval have been disapproved by the LCDC.<sup>47/</sup> However, the reason that more plans have not been submitted and approved has been that most local governments in Oregon govern very small areas and were not prepared for the complex task of developing a comprehensive land use plan rather than local opposition to the concept of local planning in conformity with statewide goals. There was some local opposition to the idea of developing plans to conform with the LCDC-adopted goals, but the LCDC and most local governments have been working together to develop acceptable plans.<sup>48/</sup>

Since its adoption in 1973, numerous attempts have been made to amend Senate Bill 100. Amendments have been suggested by state legislators as well as the public through the initiative process. However, no significant amendments have been adopted and this factor can be judged as an indication of overall popular approval of the general principles found in Senate Bill 100. An initiative that would have repealed the goals and reduced the LCDC to an advisory body was defeated by a 61-39 percent margin in 1978.<sup>49/</sup> Further evidence of the general public approval of the program is found in a recent newspaper poll which indicated that about 80% of all

Oregonians agree with the goals established by the LCDC  
under Senate Bill 100. 50/

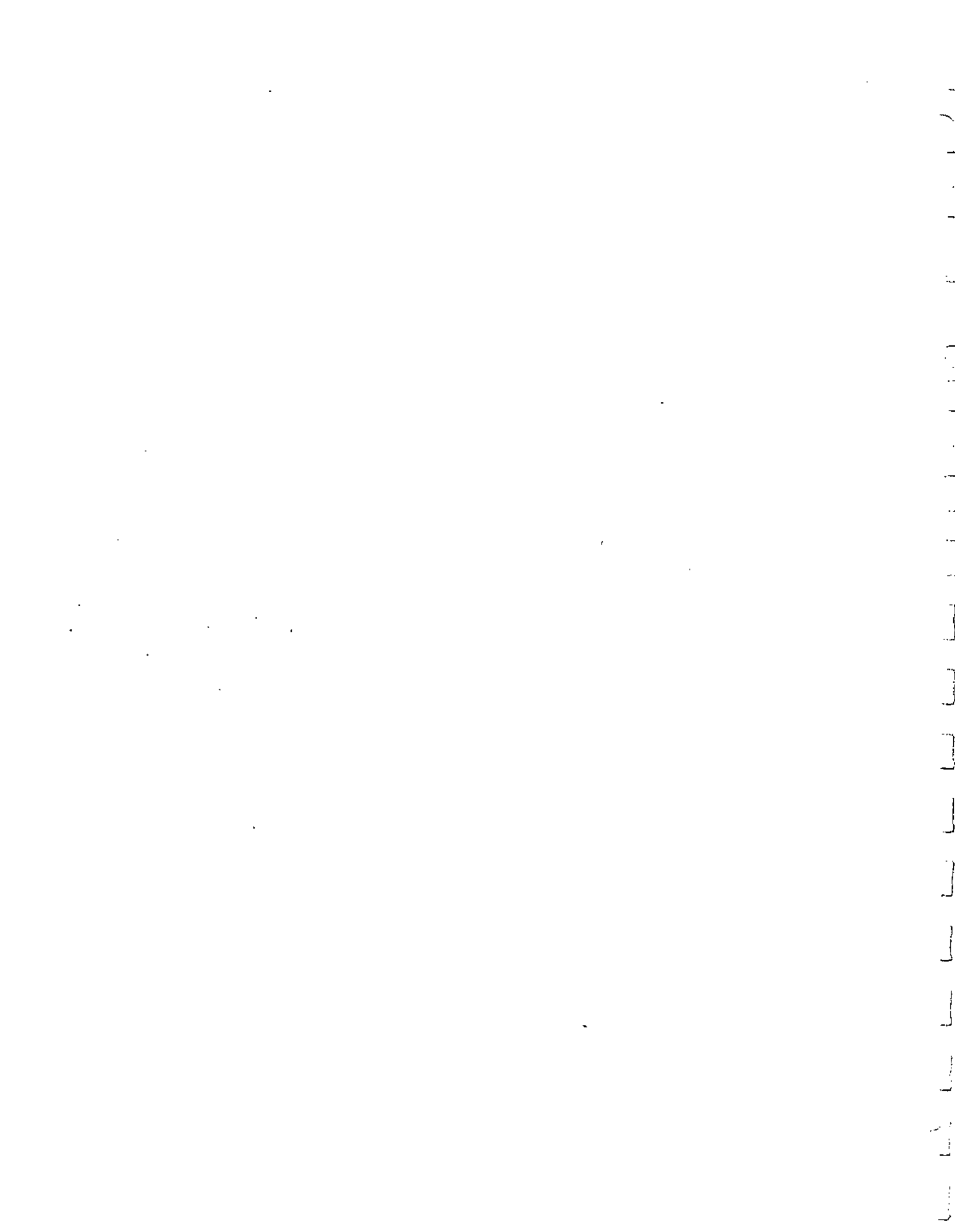
CHAPTER 1

FOOTNOTES

1. Oregon Rev. Stat. ch. 197.
2. Id. § 197.005(1) (Supp. 1977).
3. Id. § 197.075.
4. Id. § 197.040(2).
5. Id. § 197.300.
6. Id. § 197.400.
7. Id. § 197.410.
8. Id. § 197.075.
9. Id. § 197.030(1).
10. Id. § 197.030(2).
11. Id. § 197.030(3).
12. Id. § 197.225.
13. Id. § 197.230(1)(a).
14. Id. § 197.230(1)(b).
15. Id. § 197.230(2).
16. Id. § 197.235.
17. Id. § 197.240.
18. Id. § 197.245.
19. Id. § 197.250.
20. Id. § 197.255.
21. Id. § 197.251.
22. Id. § 197.251(1).

23. Id. § 197.251(2).
24. Senate Bill 435, Chapter 772, 1979 Oregon Laws.
25. Ore. Rev. Stat. § 197.320(1) (Supp. 1977).
26. Id. § 197.320(5).
27. Id. §§ 197.400, .405.
28. Id. § 197.410.
29. Id. § 197.415.
30. Id. § 197.250.
31. Id. § 197.300.
32. Id. § 197.320.
33. Id. § 197.160.
34. Id. § 197.165.
35. Senate Bill 435, Chapter 772, 1979 Oregon Laws.
36. Ore. Rev. Stat. § 197.250 (Supp. 1977).
37. Id. § 197.255.
38. Id. § 197.260.
39. Id. § 197.190(1).
40. Id. § 197.190(2).
41. Id. § 197.190(3).
42. Id. § 197.190(4).
43. J. Huffman and R. Plantico, "Toward a Theory of Land Use Planning: Lessons from Oregon," 14 Univ. of Wy. Land & Water L. Rev. 1, 38-42 (1979).
44. Id. at 43-51.
45. Telephone conference with Mr. Roger Kirchner, Information Coordinator, Dept. of Land Conservation & Development, January 17, 1980.

46. Ibid.
47. R. Healy & J. Rosenberg, Land Use and the States, 194 (2d Ed. 1979) [hereinafter cited as Healy & Rosenberg].
48. Telephone conference with Mr. Roger Kirchner, Information Coordinator, Dept. of Land Conservation & Development, January 17, 1980.
49. Healy & Rosenberg at 195.
50. Telephone conference with Mr. Roger Kirchner, Information Coordinator, Dept. of Land Conservation & Development, January 17, 1980.



CHAPTER 2

CALIFORNIA COASTAL ZONE MANAGEMENT PROGRAM

I. THE PROGRAM

In 1972, California embarked on a bold and comprehensive attempt to plan for and regulate its 1,000 miles of shoreline. In response to repeated failures by the state legislature to enact protective measures for the California coast,<sup>1/</sup> the citizens of California passed Proposition 20, the California Coastal Zone Conservation Act of 1972<sup>2/</sup> (hereinafter "Coastal Act of 1972"). The Coastal Act of 1972 created one statewide and six regional coastal commissions with complete power and authority to prepare a comprehensive plan for and to regulate all development within the coastal zone. The program set up in 1972 was by its terms a temporary one, and anticipated further and permanent legislation prior to January 1, 1977, the end of the interim program.

Prior to the expiration of these interim powers, the California legislature enacted the California Coastal Act of 1976<sup>3/</sup> (hereinafter "Coastal Act"). In doing so the legislature specifically found:

- (a) That the California coastal zone is a distinct and valuable resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
- (b) That the permanent protection of the state's natural and scenic resources



is a paramount concern to present and future residents of the state and nation.

- (c) That to promote the public safety, health and welfare and to protect public and private property, wild-life, marine fisheries and other ocean resources and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
- (d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.4/

The Coastal Act of 1976 continues the two functions of the 1972 Act: preparation of comprehensive plans for the coastal area and regulation of development in the coastal zone. The state coastal commission is re-established as a permanent agency responsible for continued coastal management. Regional commissions are retained temporarily until local governments have prepared local coastal programs that meet state approval. After certified local coastal programs are in effect, local governments become the principal regulatory bodies.

II. ADMINISTERING AGENCIES

A. California Coastal Commission

1. Composition

The California Coastal Commission (hereinafter "Commission") is a completely independent body within the Resources Agency of the state. The composition of the Commission is specifically prescribed by the Coastal Act. The secretary of the Resources Agency, the secretary of the business and Transportation Agency and the chairperson of the State Lands Commission sit as non-voting members of the Commission. Of the remaining twelve members, six must be representatives of the public to be appointed by the Governor, Senate Rules Committee and Speaker of Assembly equally. The other six are initially to be representatives of the regional commissions and, at the termination of the regional commissions, to be replaced by six representatives of local governments appointed by the Governor, Senate Rules Committee and Speaker of Assembly equally.<sup>5/</sup> Local government representatives serve only while in their local offices. Members serve at the pleasure of their appointing powers who are charged with "good faith efforts to assure that their appointments, as a whole, reflect, to the greatest extent feasible, the economic, social and geographic diversity of the state."<sup>6/</sup>

## 2. Jurisdiction and Authority

Under the 1976 Act the Commission's principal responsibilities are to certify local coastal programs, to serve as an appellate body for review of development permits and local coastal programs and to designate coastal areas of a particularly sensitive nature.

### a. Certification of Local Coastal Plans

Pursuant to the Coastal Act of 1972, the Commission has prepared and adopted the California Coastal Plan. However, in enacting the Coastal Act of 1976 the legislature chose not to include the Coastal Plan therein.<sup>7/</sup> Instead, the Coastal Act includes Coastal Resources Planning and Management Policies (hereinafter "Coastal Policies").<sup>8/</sup> The Coastal Policies purport to cover all significant coastal issues and are a distillation of the 162 major policy recommendations included in the California Coastal Plan.

The responsibility for planning under the 1976 Act is on local governments which must prepare local coastal programs for their jurisdictions. The Commission has the ultimate responsibility for certifying each local coastal program as being in conformity with the Coastal Policies.<sup>9/</sup> Following certification, amendments to local coastal programs must be reviewed and approved by the Commission.<sup>10/</sup>

Commission regulations on local coastal programs have established a practical link between local planning law requirements and Coastal Act requirements. Regulations encouraging common methodology, identification of coastal issues, establishment of use of priorities and other matters reflect mandates both of the 1976 Act and the Federal Coastal Zone Management Act of 1972 and its regulations.<sup>11/</sup>

b. Appellate Review of Coastal Development Permits and Local Coastal Programs

The Coastal Act provides that "any person wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit."<sup>12/</sup> If a person wishes to develop in an area where a local government has received certification of its local coastal program, the coastal development permit must be obtained from the local government.<sup>13/</sup> In areas where the appropriate local government does not yet have a certified program the Act provides for interim development controls similar to those established by the 1972 Act; that is, the coastal development permit must be obtained from a regional commission.<sup>14/</sup>

Regional commission decisions are appealable to the Commission.<sup>15/</sup> The standard of review on appeal to the state commission is the same as the test applied at the regional level: whether the proposed development is

consistent with the Coastal Policies of Chapter Three of the Coastal Act.<sup>16/</sup> The state body may grant, deny or modify the permit action taken by the region and may impose additional conditions. As a matter of policy in order not to circumvent the regions, the state commission directs applicants back to the regional commission if state conditions will so significantly change the project as to make it, in effect, a different project than had been considered by the regional commission.<sup>17/</sup>

After certification, regional commission permits will no longer be required and many local decisions will be final. The following kinds of local development decisions will remain appealable to the state commission, though, even after certification:

- (1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance. <sup>18/</sup>
- (2) Developments approved by the local government not included within paragraph (1) of this subdivision located on tideland, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.
- (3) Developments approved by the local government not included within paragraphs (1) or (2) of this subdivision located in a sensi-

tive coastal resource area if the allegation on appeal is that the development is not in conformity with the implementing actions of the certified local coastal program.

- (4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning district map approved pursuant to Chapter 6 (commencing with Section 30500).
- (5) Any development which constitutes a major public works project or a major energy facility. <sup>19/</sup>

The Coastal Act additionally provides for appeals to the state commission of regional commission decisions regarding the conformity of local coastal programs to the Coastal Policies. <sup>20/</sup> The state commission may, however, refuse to hear such an appeal where it determines that the appeal raises "no substantial issue." <sup>21/</sup>

An important provision of the 1976 Act which had not been included in the 1972 Act provides that decisions of the state commission shall guide regional commissions and local governments in their future actions under the provisions of the Coastal Act. <sup>22/</sup>

An appeal before the state commission is a de novo public hearing. <sup>23/</sup> One of the more interesting aspects of the procedural provisions of the Coastal Act is that an appeal to the state commission may be taken by an applicant or any aggrieved person. <sup>24/</sup>

[A]n "aggrieved person" means any person who, in person or through a representative, appeared at a public hearing of the commission, regional commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, regional commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either. "Aggrieved person" includes the applicant for a permit and, in the case of an approval of a local coastal program the local government involved. 25/

Judicial review of decisions of the state commission is likewise available to an "aggrieved person." 26/

c. Designation of Sensitive Coastal Resource Areas

The Commission was given authority under the Coastal Act to designate, not later than September 1, 1977, "sensitive coastal resource areas" of regional or statewide significance where the protection of coastal resources and public access require control beyond that required for other areas of the coastal zone. 27/ Upon designation, the state commission would also recommend to the legislature that these sensitive areas be designated as such by statute. Without statutory designation, areas designated by the Commission would remain so designated for only two years. 28/

The Coastal Commission chose not to designate land within the Coastal Zone as sensitive coastal resource areas because it did not feel that the additional authority

was necessary to carry out the provisions of the Coastal Act.<sup>29/</sup>

B. Regional Coastal Commissions

1. Composition

Specific provisions of the Coastal Act govern the makeup of each of the six regional commissions within the coastal zone. Membership is generally allocated among representatives of the public and of local governments within each region but size and specific membership of each commission varies depending on the region represented. For example, the North Central Coast Regional Commission must include one supervisor and one city councilperson from Sonoma and Marin counties, two supervisors of the City and County of San Francisco, one delegate of the Association of Bay Area Governments and seven representatives of the public.<sup>30/</sup> Representatives of local governments or regional agencies are selected by their respective governing bodies; representatives of the public are appointed equally by the Governor, the Senate Rules Committee and the Speaker of the Assembly.<sup>31/</sup>

2. Jurisdiction and Authority

The six regional coastal commissions serve as intermediate reviewing agencies for local coastal programs and, prior to the certification of a local government's



local coastal program, as the initial permitting agency for development within the coastal zone. However, both the inception and termination of the regional commissions is provided for by statute.

The Coastal Act provides that a regional commission has no power and can take no action unless and until the state commission certifies that the regional agency is necessary to expedite the review of local coastal program and coastal development permit applications.<sup>32/</sup>

The state commission has, in fact, certified each of the six regional commissions that are now operating.<sup>33/</sup>

Each regional commission terminates within thirty days after the last local coastal program required within its region has been certified and all implementing devices have become effective or June 30, 1981, whichever occurs first.<sup>34/</sup> Upon the termination of any regional commission the state commission succeeds to any remaining obligations, powers or responsibilities of the regional commission.<sup>35/</sup>

a. Approval of Local Coastal Programs

Although the state commission has the ultimate responsibility for certifying local coastal programs prepared by local governments, the local programs must first go through an intermediate approval process at the regional commission level.<sup>36/</sup> Local coastal programs must include (1) a land use plan and (2) zoning ordinances, zoning maps

and other implementing actions, if any. The two portions of a program may be submitted and reviewed separately.<sup>37/</sup>

The regional commission has 90 days to review a local land use plan for its conformity to the Coastal Act's Coastal Policies. Zoning ordinances and implementing materials must be reviewed within 60 days of submission and approved if they conform to and are adequate to carry out the provisions of the certified land use plan.<sup>38/</sup>

If either component is disapproved at the regional level, the local government may either revise its submission or appeal the regional decision to the state commission. Where the state commission finds that no substantial issue is raised by the appeal it may refuse to hear the appeal, in which case the action of the regional commission is final.<sup>39/</sup>

b. Regulation of Development Within  
the Coastal Zone

Until local governments have effective local coastal programs of their own the six regional coastal commissions will continue the permitting responsibility they began under the 1972 Act. In order to undertake development within the coastal zone, a person must secure a coastal development permit from the regional commission in addition to any other governmental approval that may be required.

"Development" is defined as follows:

[O]n land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. 40/

The regional commission is required to hold a de novo hearing on each application for a coastal development permit after notice has been given to any affected persons and within 49 days after the date on which the application has been filed with the commission. 41/ Within 21 days of the public hearing the regional commission must act on the application. 42/ Actions of the regional commission become final 10 days after they are taken unless an appeal is

filed with the state commission within that time.<sup>43/</sup>  
Decisions of the regional commission are stayed pending  
a decision on appeal.<sup>44/</sup> Provisions of the Coastal Act  
allow for expedited review of emergency<sup>45/</sup> and minor  
development activity and for reconsideration of decisions.<sup>46/</sup>

In order to grant a coastal development permit under the 1972 Act, the commissions had to find that a development would have no substantial adverse environmental effect and would be consistent with "the maintenance, restoration, and enhancement of the overall quality of the coastal environment, including but not limited to, its amenities." Developments were also to be consistent with the "continued existence of optimum population of all species of living organisms" and the avoidance of "irreversible and irretrievable commitments of coastal zone resources."<sup>47/</sup>

The Coastal Policies of Chapter Three of the 1976 Act are the only legislative standards by which permit applications are now judged.<sup>48/</sup> These general statements rely heavily on the discretion of regional commissions for effective and consistent implementation. The policies are categorized under the headings of general, public access, recreation, marine environment, land resources, development and industrial development. The following are examples of the policy statements applied by the commission to determine

whether to grant permit applications:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. 49/

\* \* \*

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. 50/

\* \* \*

New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. 51/

\* \* \*

Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and where feasible, to restore and enhance visual quality in visually degraded areas. 52/

\* \* \*

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible. 53/

Permits may be granted subject to conditions which ensure development consistent with the policies of the Act.

The permitting process, which ensures adherence to the Coastal Policies, is now lodged in the regional commissions but will be transferred to local governments after certification of their local coastal programs.

### III. OTHER STATE AGENCIES INVOLVED IN THE PROGRAM

The Coastal Act expressly provides that the coastal development permit required to develop land within the coastal zone is "[i]n addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency . . . ." <sup>54/</sup> Although it adds another layer of permitting, the Coastal Act evidences an attempt by the legislature to deal with the multiple permit problem.

The Act provides generally for joint permit procedures where feasible <sup>55/</sup> and requests every public agency

to cooperate with the coastal commissions by providing them with assistance and information.<sup>56/</sup> Moreover, Chapter 5 of the Coastal Act is devoted entirely to the problem of redundant reviews and overlapping jurisdictions of state agencies. While generally prohibiting the coastal commissions from adopting regulations which duplicate those of another existing state agency,<sup>57/</sup> Chapter 5 addresses specific areas of conflict with such state agencies as the San Francisco Bay Conservation and Development Commission, Department of Fish and Game, State Water Resources Control Board, State Energy Resources Conservation and Development Commission, State Air Resources Board, Office of Planning and Research, State Lands Commission and State Board of Forestry.

The Coastal Act allows the coastal commissions great power to review other agencies' development activities.<sup>58/</sup> The only exception is that the Coastal Act removes the coastal commissions' authority to set the location of new power plants.<sup>59/</sup> However, the state commission is allowed to designate areas where the state energy agency may not locate them.<sup>60/</sup> The state commission has already designated 260 miles of coastline as unsuitable for power plant construction.

California's coastal management program provides for more than just regulation pursuant to the police power.

A State Coastal Conservancy<sup>61/</sup> has been established with broad powers to purchase, sell, and lease interests in coastal lands, to recommend that the State Public Works Board use the power of eminent domain, and to make grants and loans for achieving purposes of the California Coastal Act of 1976.

The State Coastal Conservancy -- consisting of the chairman of the Coastal Commission, the secretary of the Resources Agency, the director of finance, and two members of the public appointed by the governor -- is given broad powers for achieving those goals of the California Coastal Act that cannot adequately be achieved by exercise of the police power. The conservancy will perform important functions in promoting several general coastal policies, including protection of agricultural lands, coastal restoration projects, coastal resource enhancement projects, establishing resource protection zones, preservation of significant coastal resource areas, and establishing a system of public accessways.

#### IV. LOCAL GOVERNMENT PARTICIPATION

Local government has played a changing role over the last decade in California's effort to regulate development within the coastal zone. It is generally agreed that the 1972 initiative process was a direct reaction to local governments' unwillingness to protect the coast from



increasing development pressure.<sup>62/</sup> Prior to 1972 local governments throughout California enjoyed great power to plan for and regulate development within their jurisdictions unfettered by state interference.<sup>63/</sup> If coastal jurisdictions had been able to face local political pressure and make the unpopular decision to limit coastal development, the citizens of California might not have sought or succeeded in giving control to the state.

Under the Coastal Act of 1972, local government lost the right to make development decisions within the coastal zone. It is true that whatever local permits a developer had to obtain prior to 1972 were still required under the Coastal Act of 1972.<sup>64/</sup> Regional commissions could not even address an application unless local government had approved the development in concept.<sup>65/</sup> Nevertheless, regional commissions, or the state commission on appeal, could veto every development approval granted by local government within the coastal zone.

Under the 1972 Act the state and regional commissions repeatedly emphasized the importance of local planning. Where no local plan existed for an area the commissions often found it necessary to deny permits because the finding required by the statute could not be made in the absence of a specific, enforceable development plan for the entire region.<sup>66/</sup> The commissions' experience with

local planning during the interim permit process convinced them that such planning could be effectively accomplished if properly encouraged. This conviction set the stage for their final recommendation, as stated in the Coastal Plan, that primary responsibility for implementation of the Coastal Plan be delegated to local governments under coastal agency supervision.<sup>67/</sup>

Although the Coastal Plan was not adopted in the Coastal Act of 1976, the legislature followed the commissions' recommendation and placed the burden of coastal planning on local governments. The Coastal Act of 1976 creates a complex new state-local partnership for coastal protection in which local governments must prepare a detailed land use plan and implementation actions as components of the overall management strategy.<sup>68/</sup>

The local coastal program must conform to a state-determined methodology<sup>69/</sup> and be certified<sup>70/</sup> by regional and state commissions. The locality may request the state commission to prepare its program<sup>71/</sup> but failure to act locally allows controls to be retained at the state level.<sup>72/</sup> Once certified, local government is the administrator of the coastal permit program and can integrate permits with other development approvals.<sup>73/</sup> Only local actions inconsistent with the coastal program,<sup>74/</sup> or which affect public access or the ecology of the adjacent shoreline,<sup>75/</sup> may be appealed

to the state commission.<sup>76/</sup>

This intergovernmental allocation of roles ensures a strong commission interest in both state and local actions affecting coastal development. The Coastal Act of 1976 sets out a policy framework and a structure for management that provides discretion at all levels for determining the details of planning and regulation. It transfers much of the initiation of coastal strategies to the local level, although state specification and review limits the variety and shape of these programs.<sup>77/</sup> With the elimination of regional commissions by 1981, the state commission will have an increased burden to assess any spillover effects of local actions on broader coastal interests. The capacities of local governments will also be tested by requiring municipalities to account for regional needs as well as their own interests.

V. SUCSESSES AND FAILURES OF THE PROGRAM

The adoption of the Coastal Act of 1976 testifies as to the overall success of the coastal management program begun in 1972 by initiative. Specific aspects of the interim program continue today and ensure longevity.

The composition of the coastal commissions and the nature of the commission hearings has often been cited as contributing to the program's ultimate success.<sup>78/</sup> The

combination of a discretionary decision-making process and politically responsive decision-makers increases the probability that competing economic, environmental and social policies will be considered. Regional commissions allow a high level of visibility and ready accessibility to the regional commissioners.

The coastal program has been distinguished from its inception by a high degree of public involvement. The commissions decided early to conduct very informal hearings in order to encourage public participation. Public involvement in the interim permitting process led to extensive public involvement in the planning process as well. Special planning methodology was adopted by the state commission early on to allow effective public participation in the preparation of the Coastal Plan.<sup>79/</sup>

The commissions' overall permit record under the 1976 Act has been quite similar to that during the interim period. Statewide, about 95 percent of the permit applications have been approved, with about 7 percent of all regional decisions appealed to the state body.<sup>80/</sup> Obviously, the Coastal Act has not brought construction along the coast to a halt. Several factors explain the high approval rate. Most of the permit applications have been for single-family homes or for other minor projects in areas which were already developed. These have minimal impacts on coastal

resources.

The majority of permits are approved subject to conditions designed to bring the projects into compliance with the Coastal Act. Included are conditions to control density, height and appearance, to increase public access to the shoreline, to protect scenic vistas, and to mitigate adverse environmental affects. Many permits were granted for projects which have been modified before they came before the commissions. In addition, some developers, whose projects clearly would not have been approved, never applied for coastal permits; this resulted in a greater proportion of acceptable projects being reviewed by the commissions.<sup>81/</sup> The success of the commissions' regulatory role should perhaps be judged not by the number of permits granted but rather by the nature of conditions attached on development permits and by the planning policies that evolved from individual permit reviews.<sup>82/</sup>

The Coastal Plan adopted by the state commission in 1975 was not included in the 1976 legislation. However, the important policies of the Coastal Plan have been incorporated in the form of statutory policies by which all permit applications and local coastal programs are judged. Additionally, most of the recommendations of the Coastal Plan are reflected in the Coastal Act. The Coastal Act continues the planning process by mandating that local

governments create plans consistent with statutory policies. The ultimate result will be plans more sensitive to specific local needs yet reflective of extra jurisdictional concerns.

The planning mandate to local governments may, however, have unrealistic deadlines. Local governments must prepare and have certified their local coastal programs by June 30, 1981. Most affected local governments are now actively involved in their coastal planning. About twenty-five local land use plans are in various stages of approval but only one jurisdiction, Palos Verdes Estates, has a certified local coastal program.<sup>83/</sup>

It is, however, obvious that all local governments will not meet their 1981 deadline. The number of jurisdictions that will not have local coastal programs certified by that time may be as high as 50%. When the regional commissions go out of existence as of June 30, 1981, the state commission becomes the permitting agency for all local governments who at that time do not have certified local coastal programs. The practical work burden this presents for the state commission, which at the same time will be continuing the certification procedures, is self-evident. Although local governments have had sufficient time already to prepare their plans, the bulk of submissions is only now beginning. During the next eighteen months the state commission will have to

work frantically to process the local programs that do come in. There is also some evidence of problems with the substance of local plans which in some cases may be based on more traditional zoning techniques instead of the flexible approaches necessary to deal with the range of development options in the coastal area.<sup>84/</sup> It appears probable that the standards for certification will have to be lowered and the review procedures simplified in order to certify as many programs as possible by the deadline.

The relationship between local governments and the state and regional commissions has often been strained over the past eight years. Although many local governments have accepted their role in the coastal program others still feel that the coastal program is an unwarranted intrusion into areas of purely local concern. Those which have warmed to the idea recognize that development pressure has shifted away from them and onto the commissions and that coastal protection means they no longer have to suffer the effects of extra jurisdictional coastal development.<sup>85/</sup>

The state commission's relation with other state agencies has also been a sensitive issue.<sup>86/</sup> Although on the whole intergovernmental relations are good, there is still need for improvement.<sup>87/</sup> The Act of 1976 attempts to rectify some of the specific intergovernmental problems.

A significant mark of the success of the California program has been its ability to withstand judicial attack. The Act of 1972 came under immediate and repeated attack in the California courts. Developers first contended that the initiative process rendered the 1972 Act void by denying affected property owners an opportunity to be heard. The court did not agree.<sup>88/</sup> In San Diego Coastal Regional Commission v. See the Sea, Ltd.,<sup>89/</sup> the Coastal Act of 1972 was held not to constitute a moratorium because, in part, the court could find no language in the act imposing a moratorium.

Procedural due process challenges to the commissions' hearing procedures have also failed.<sup>90/</sup> An important case questioned whether the standards contained in the Act were unconstitutionally vague. The court held that the Act's explicit mandate to protect resources through interim controls while preparing for long-range coastal management was adequate for the commissions to exercise discretionary authority.<sup>91/</sup>

The interim nature of the 1972 Act was relied on again in State v. Superior Court<sup>92/</sup> to find that the commissions' permit controls were a necessary method of assuring that development did not irreversibly commit coastal resources to uses inconsistent with the contemplated coastal plan. As such, the permit controls could not constitute inverse condemnation.



CHAPTER 2

FOOTNOTES

1. Gilbert L. Finnell, Jr., "Coastal Land Management in California," 4 American Bar Foundation Research Journal 659 at 652-53 (1978) [hereinafter cited as Finnell].
2. Cal. Pub. Res. Code §§ 27000-650 (West Supp. 1975) (repealed January 1, 1977).
3. Cal. Pub. Res. Code §§ 30000-30900 (West 1977 & Supp. 1979).
4. Id. § 30001.
5. Id. § 30301.
6. Id. § 30310(b).
7. Id. § 30002.
8. Id. §§ 30200-30264.
9. Id. § 30512(c).
10. Id. § 30514(a).
11. California Coastal Commission Local Coastal Program Regulations (adopted May 17, 1977) in U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management and California Coastal Commission, Combined State of California Coastal Management Program (segment) and Final Environmental Impact Statement at 5-1 (Aug. 1977).
12. Cal. Pub. Res. Code § 30600(a) (West 1977 & Supp. 1979).
13. Id. § 30600(d).
14. Id. § 30600(c).
15. Id. § 30602(b).
16. Id. § 30604(a).
17. Peter M. Douglas & Joseph E. Petrillo, "California's Coast: The Struggle Today-A Plan for Tomorrow (I)," 4 Fla. St. U. L. R. 179 at 209 (1976) [hereinafter cited as Douglas & Petrillo].

18. The grounds for appeal regarding a development under (1) are limited to the following:

(1) The development fails to provide adequate physical access or public or private commercial use or interferes with such uses.

(2) The development fails to protect public views from any public road or from a recreational area to, and along, the coast.

(3) The development is not compatible with the established physical scale of the area.

(4) The development may significantly alter existing natural landforms.

(5) The development does not comply with shoreline erosion and geologic setback requirements.

(6) The standard of review for any development reviewed pursuant to subdivision (a)(3) shall be in conformity with the implementing actions of the certified local coastal program.

Cal. Pub. Res. Code § 30603(b) (West 1977 & Supp. 1979).

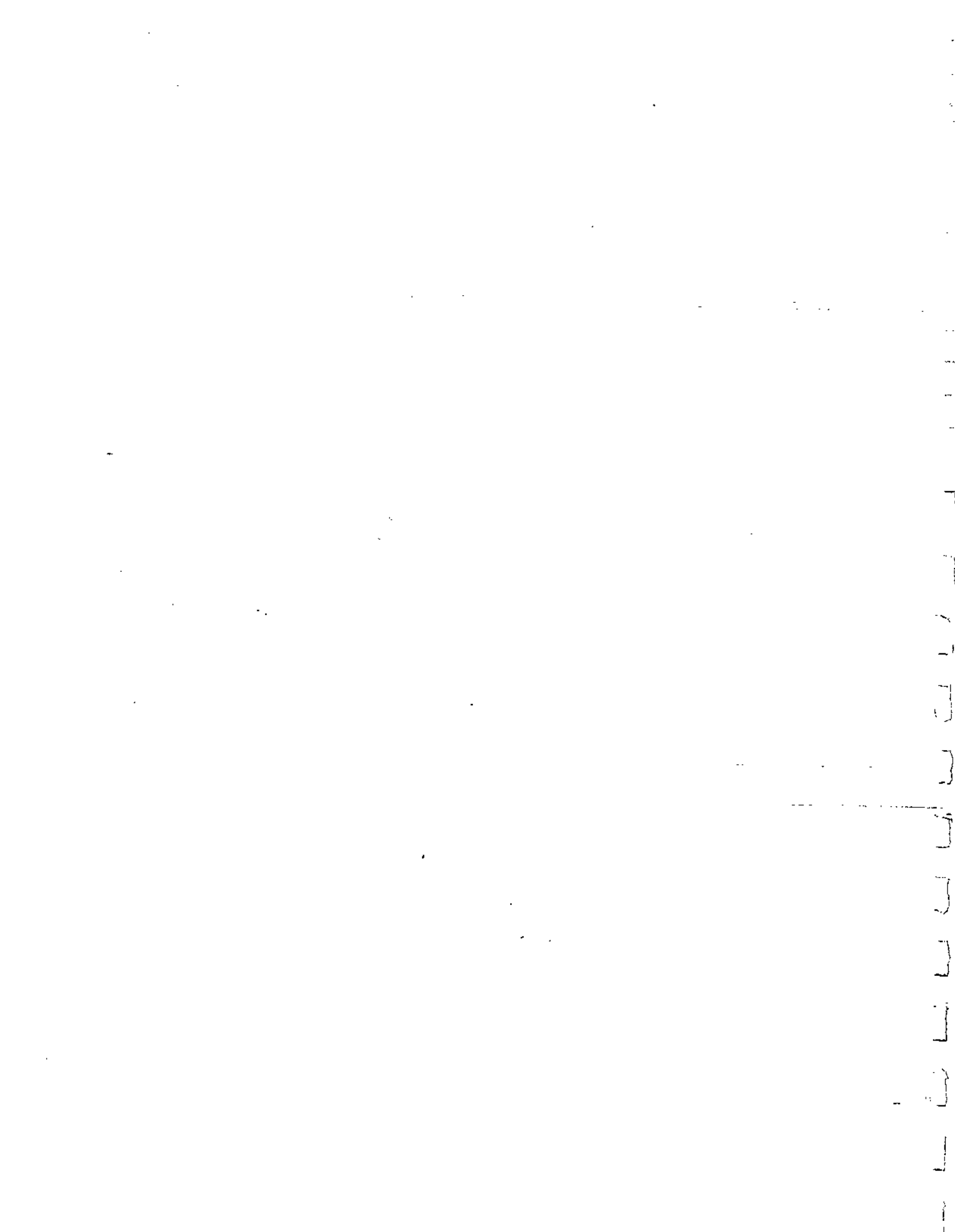
19. Id. § 30603(a).
20. Id. §§ 30512(b); 30513(b), (c).
21. Id. §§ 30512(c); 30513(d).
22. Id. § 30621.
23. Id. § 30625(a).
24. Id. § 20625(a).
25. Id. § 30801.
26. Id. § 30625(c).
27. Id. § 30502.
28. Id. § 30502.5.
29. Telephone conference with Peter Douglas, Assistant Director, California Coastal Commission, January 14, 1980.

30. Cal. Pub. Res. Code § 30302.
31. Id. § 30303.
32. Id. § 30304.5(b).
33. Telephone conference with Peter Douglas, Assistant Director, California Coastal Commission, January 14, 1980.
34. Id. § 30305.
35. Id.
36. Id. § 30512(a).
37. Id. § 30511.
38. Id. §§ 30512; 30513.
39. Id. § 30513(d).
40. Id. § 30106.
41. Id. § 30621.
42. Id.
43. Id.
44. Id. § 30623.
45. Id. § 30624.
46. Id. § 30627.
47. Cal. Pub. Res. Code §§ 27402; 27302 (West Supp. 1975).
48. Cal. Pub. Res. Code §§ 30200; 3064 (West 1977 & Supp. 1979).
49. Id. § 30212(a).
50. Id. § 30230.
51. Id. § 30250(a).
52. Id. § 30251.
53. Id. § 30260.

54. Id. § 30600(a).
55. Id. § 30337.
56. Id. § 30336.
57. Id. § 30401.
58. Id. § 30003.
59. Id. § 30600(a).
60. Id. § 30413(b).
61. Id. §§ 31000-31406.
62. See, e.g., Douglas & Petrillo, supra at 182.
63. Cal. Gov't. Code § 65800 (West 1966).
64. Cal. Pub. Res. Code § 30600(a) (West 1977 & Supp. 1979).
65. California Coastal Zone Conservation Commission Regulations § 13210 (January 23, 1974).
66. Douglas & Petrillo, supra at 218-20.
67. CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, CALIFORNIA COASTAL PLAN 12 (1975).
68. Cal. Pub. Res. Code § 30500(a) (West 1977 & Supp. 1979).
69. Id. § 30501(a).
70. Id. §§ 30510-30522.
71. Id. § 30500(a).
72. Id. § 30600(c).
73. Id. §§ 30600(b); 30519.
74. Id. § 30603(a)(3).
75. Id. §§ 30603(b)(1)-(5).
76. Id. §§ 30620-30626.
77. Id. § 30305.

78. Finnell, supra at 677-81; Douglas & Petrillo, supra at 191-94.
79. Douglas & Petrillo, supra at 213-14.
80. California Coastal Commission, Biennial Report 1977-78; Telephone conference with Peter Douglas, Assistant Director, California Coastal Commission, January 14, 1980.
81. Robert G. Healy, "Saving California's Coast: The Coastal Zone Initiative & Its Aftermath," 1 California Coastal Zone Management Journal 365 at 371 (1974).
82. Many permits are subject to conditions with which the applicant is not able to comply. Thus development cannot proceed even though a permit has been "approved." For example, owners of the remaining lots in already developed subdivisions who sought coastal permits after 1972 have been granted permits on the condition that beach front land owned by a homeowners' association be conveyed to the public for beach access. Telephone conference with Peter Douglas, Assistant Director, California Coastal Commission, January 14, 1980.
83. Telephone conference with Peter Douglas, Assistant Director, California Coastal Commission, January 14, 1980.
84. Finnell, supra at 737.
85. Douglas & Petrillo, supra at 198-99.
86. Id. at 195-99.
87. Finnell, supra at 749.
88. CEED v. California Coastal Zone Conservation Commission, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974).
89. 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).
90. Reed v. California Coastal Zone Conservation Commission, 55 Cal. App. 3d 889, 127 Cal. Rptr. 786 (1975).
91. CEED, supra.
92. 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

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CHAPTER 3

VERMONT ACT 250

I. THE PROGRAM

Since the early 1960's, Vermont has faced a boom in the development of vacation resorts and second homes. This boom led to increased concern about the potential impact on the Vermont environment of this recreation boom and the probable commercial and industrial expansion that would accompany it. As a result of this concern, the governor appointed a Commission on Environmental Control to study the potential problems and to suggest solutions. This study commission's recommendations were adopted by the state legislature in 1970 in the form of a new Environmental Control Law (hereinafter "Act 250").<sup>1/</sup>

The legislature determined that:

the unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont [had] resulted in usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont. . . .<sup>2/</sup>

Further, the legislature reasoned that it was necessary to create an administrative body to:

regulate and control the utilization and usages of the lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through



orderly growth and development and are suitable to the demands and needs of the people of the state. . . .<sup>3/</sup>

Act 250, which is applicable to the entire state, provides a two-pronged attack on uncontrolled, and potentially destructive, development in the state. First, it creates a state Environmental Board (hereinafter "Board") with the responsibility of preparing an interim capability and development plan, a final capability and development plan and land use plan.<sup>4/</sup> Act 250 also creates nine District Environmental Commissions (hereinafter "district commissions") which have primary responsibility for granting permits for developments subject to the jurisdiction of Act 250.<sup>5/</sup> Decisions of the district commissions with respect to grants or denials of permits are appealable to the Board.<sup>6/</sup>

## II. ADMINISTERING AGENCIES

### A. The Environmental Board

#### 1. Composition

The Environmental Board is an independent regulatory body within the Agency of Environmental Conservation, an agency which encompasses all Vermont state departments concerned with natural resources. The Board's regulatory authority is independent of that of the Agency, but it is a part of the Agency for staff and budget purposes.<sup>7/</sup> The Board is composed of nine members appointed by the governor,

with the advice and consent of the senate. Eight of the members serve four-year terms and the ninth, the chairman, serves a two-year term.<sup>8/</sup>

## 2. Jurisdiction and Authority

The Board has two primary functions under Act 250. First, the Board has appellate jurisdiction over decisions by the district commissions relating to permit applications.<sup>9/</sup> Second, the Board is responsible for preparing capability and development plans and land use plans.<sup>10/</sup>

### a. Appellate Jurisdiction

Any party to a permit application proceeding can appeal the district commission's decision to the Board.<sup>11/</sup> All persons or entities entitled to notice of the application, adjoining property owners who requested a hearing and any other persons that the Board by rule provides are considered parties to the proceeding.<sup>12/</sup> When an appeal is taken, the Board must give notice to interested persons and schedule a de novo hearing on all issues raised by any party.<sup>13/</sup> The Board issues a new decision based on the same criteria considered by the district commission.

### b. The Three State Plans

Act 250 charges the Board with three separate planning tasks. First, the Board was to develop an interim capability and development plan (Interim Plan). This Interim Plan was to describe the existing uses of all

land in the state and "define broad categories of the capability of the land for development and use based on ecological considerations. . . ." <sup>14/</sup> The Interim Plan was to be in effect until a permanent plan was adopted. <sup>15/</sup> As adopted in 1972, the Interim Plan was little more than a statement of general policies and a series of maps showing which areas of the state had physical limitations to development. <sup>16/</sup>

The Board's second planning task was to develop a final land capability and development plan (Land Capability Plan). <sup>17/</sup> This plan was completed by the Board in 1972 and adopted by the state legislature, after extensive revision, in 1973. The Land Capability Plan, as adopted, consists primarily of a series of amendments to the original Act 250. <sup>18/</sup>

Several of these amendments clarify the original Act's environmental criteria. Most of these amendments were consistent with the interpretations given the Act by the district commissions prior to the amendments and, therefore, served only to clearly spell out the Act's requirements for the benefit of developers and commissioners. <sup>19/</sup>

The Land Capability Plan also strengthened the planning power of local communities. The district commissions and Board are now forbidden from granting or denying permits if the action would be inconsistent with

a local plan or capital budget so long as the proposed development did not significantly affect surrounding towns or involve matters of overriding state interest. Thus, the Board and district commissions cannot stop towns which desire to plan for major growth within their borders which will not significantly impact surrounding areas or involve matters of overriding state interest.<sup>20/</sup>

The Land Capability Plan also requires the Commission to consider the impact of a proposed development on the ability of a town to provide public services if the local government has adopted a capital plan. Under the Land Capability Plan, the developer must establish that existing public facilities are adequate to serve the development. This provision allows local governments to control the amount of growth they will experience by timing the construction of public facilities.<sup>21/</sup>

The final planning task to be accomplished by the Board was the development of a statewide land use plan (Land Use Plan). The Land Use Plan was to be based on the Land Capability Plan and was "to determine in broad categories the proper use of the lands in the state."<sup>22/</sup> In adopting the Land Use Plan the Board was to take into consideration existing regional and municipal plans.<sup>23/</sup>

In January, 1974, the first official version of the Land Use Plan was approved by the governor and sent

to the legislature. The Land Use Plan indicated that most development should take place in existing cities and towns and at existing densities. Growth in rural areas was planned to take the form of cluster subdivisions or new communities. The entire state was divided into urban, village, rural, natural resource, conservation, shoreline or roadside districts. Growth at high densities was to be allowed in urban and village areas but development in rural, natural resource and conservation areas was to be allowed only at a density of one building per 5, 25 and 100 acres respectively.<sup>24/</sup>

Local governments were given one year to prepare plans for development within their borders. Conservation areas were to be determined by the state, but local governments would be allowed to plan for the development of other land within their boundaries. These plans, however, would have to be approved by the Board. If a town failed to adopt a satisfactory plan, the Board would enforce its Land Use Plan.<sup>25/</sup> As a result of pressure exerted on legislators by individual property owners who feared that the state plan would too drastically limit development of their property, the Land Use Plan was not approved by the legislature. Several revised Land Use Plans were also considered and rejected by the state legislature in subsequent years.<sup>26/</sup>

To the present date, no Land Use Plan has been approved by the legislature.

B. District Environmental Commissions

1. Composition

The nine district commissions each are composed of three members appointed by the governor. Two of the three members are appointed to four-year terms. The third member, the chairman, is appointed to a two-year term.<sup>27/</sup>

The district commissioners are appointed from the districts on which they serve, but no qualifications for members are imposed by the statutes. The district commissions are assisted administratively by regional coordinators, who serve as administrative officers. In addition, the commissions may utilize additional administrative support from the area's regional planning commission.<sup>28/</sup>

2. Jurisdiction and Authority

Each district commission is responsible for granting permits for sale or construction of any subdivision or development within the particular district.<sup>29/</sup> Development is defined as follows:

[T]he construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes. "Development" shall also mean the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning

and subdivision bylaws. The word "development" shall mean the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land. The word "development" shall not include construction for farming, logging or forestry purposes below the elevation of 2,500 feet. The word "development" also means the construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings. The word "development" shall not include an electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30. The word "development" shall also mean the construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet. 30/

Subdivision is defined as:

a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, and within any continuous period of 10 years after the effective date of this chapter. . . . 31/

A lot under the Act is defined to include only undivided interests in land of less than ten acres. 32/

The permitting procedure is initiated by the filing of an application with the district commission by the person seeking a permit. 33/ Notice must be given by

the applicant to any municipality and municipal or regional planning commissions in which the subject land is located and, if the land is located on a municipal border, to all adjacent municipalities and municipal or regional planning commissions. The notice must also be filed with the town clerk of the town in which the land is located.<sup>34/</sup> The district commission is required to forward notice and a copy of the application to the Board, any state agency directly affected and any other municipality, state agency or person the district commission or Board deems appropriate.<sup>35/</sup>

A hearing may be requested within fifteen days of receipt of notice by any person entitled to notice or any adjoining property owners. The district commission may, within twenty days of receipt of the application, order a hearing regardless of any requests.<sup>36/</sup> The date for the hearing must be set within twenty-five days of receipt of the application and the hearing must be held within forty days of receipt of the application. Parties must be given notice at least ten days before the hearing and notice must also be published in a local newspaper.<sup>37/</sup> If no hearing is requested the district commission may grant or deny the permit without a hearing but must do so within sixty days of receipt of an application or the application is deemed approved and a permit must be issued.<sup>38/</sup>



The Protection Division of the Agency of Environmental Conservation processes the applications and distributes copies of them among affected state agencies with a standard form requesting review of the application. These agencies review the application for compliance with any departmental rules (a permit from a district commission does not replace any approval required by any other state agency or municipal authority<sup>39/</sup>) and offer any comments relating to their areas of expertise. These comments are summarized and supplemented by the Protection Division and submitted to the Agency 250 Review Committee -- an inter-departmental body consisting of representatives from state departments having a continuing interest in applications for permits -- for its review. The Review Committee prepares a report containing its opinions which is forwarded to the district commission along with the Protection Division's comments.<sup>40/</sup>

As noted above, regional and municipal planning commissions are given notice of applications for permits relating to land within their jurisdictions.<sup>41/</sup> Regional plans are frequently drafted in such general terms that they offer little assistance to the district commissions in ruling on permit applications; however, these plans are one factor considered by the district commission in reaching a decision. Local planning commissions offer more significant

input in municipalities in which they are operating. Local planning is still in its developing stages in many towns, though, and does not always provide specific guidelines for a permit decision.<sup>42/</sup> A permit application cannot be approved, however, unless the district commission finds that the proposed development is in conformity with all applicable regional and local plans.<sup>43/</sup>

Before a permit can be granted, the district commission must find that the development:

- (1) Will not result in undue water or air pollution. . . .
- (2) Does have sufficient water available for reasonably foreseeable needs of the subdivision or development.
- (3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.
- (4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.
- (5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports, and airways, and other means of transportation existing or proposed.
- (6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.
- (7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

\* \* \*

(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted. . . .

\* \* \*

(10) Is in conformance with any duly adopted local or regional plan or capital program. . . . 44/

The burden of proof with respect to items (1), (2), (3), (4), (9) and (10) is on the applicant. Any party opposing the application bears the burden of establishing items (5), (6), (7) or (8). 45/

An application cannot be denied unless the district commission finds that the proposed subdivision or development will be detrimental to the public health, safety or general welfare. Any denial of a permit must contain specific reasons for that denial. A permit cannot be denied solely for the reasons set out in items (5), (6) or (7), discussed above. Rather, the district commission must establish reasonable conditions and requirements to alleviate the burdens created. 46/

Decisions of the district commission are appealable to the Board, as discussed above, or to the county court. In both cases, a de novo hearing is held. The decision of the Board or county court can be appealed directly to

the state supreme court by any party to the initial hearing. No objections may be raised before the supreme court, however, unless they were raised before the Board or county court.<sup>47/</sup>

### III. OTHER STATE AGENCIES INVOLVED IN PROGRAM

Because the permit required prior to development or subdivision under Act 250 does not "supersede or replace the requirements for a permit of any other state agency . . .,"<sup>48/</sup> the Act does not provide a "one-stop" procedure for obtaining the permits necessary to develop or subdivide land. Numerous other state agencies are involved in granting permits to developers at various stages of the development of property.

However, Act 250 does provide a vehicle for coordinating the opinions of all interested state departments. The Act specifically requires each district commission to forward applications for permits to any state agency directly affected by the proposed development.<sup>49/</sup> As noted above, the Protection Division of the Agency of Environmental Conservation funnels the permit applications to all interested state agencies for their comments.<sup>50/</sup>

### IV. LOCAL GOVERNMENT PARTICIPATION

The permit issued by the district commissions is in addition to, not in place of, any approval needed from any local government.<sup>51/</sup> In addition, a permit cannot be

issued unless the district commission finds that the proposed development is in conformance with any duly adopted local or regional plan.<sup>52/</sup> However, a development which has received all necessary local permits must also obtain a permit from the Agency before initiating the project.

Any municipality can create a planning commission by act of the local legislature.<sup>53/</sup> These commissions are comprised of three to nine members appointed by the local legislature.<sup>54/</sup> These commissions are empowered to develop a comprehensive zoning plan<sup>55/</sup> and, if such a plan is adopted, the district commission may not grant permits for development or subdivision not consistent with the plan.

Similarly, a regional planning commission can be formed by agreement of the local legislatures of contiguous municipalities.<sup>56/</sup> Regional planning commissions are comprised of one member from each participating municipality appointed by the local legislature.<sup>57/</sup> Regional planning commissions are also authorized to develop comprehensive zoning plans<sup>58/</sup> which must be satisfied before a district commission may grant a permit under Act 250.

Local and regional planning commissions also will play a role in developing any Land Use Plan under the Act. The Board is required to submit any such Plan to each municipal and regional planning commission for comments before a final Land Use Plan is submitted to the legislature.

The Board must respond specifically to any comments on the plan made by any of these commissions.<sup>59/</sup>

V. SUCCESSSES AND FAILURES OF THE PROGRAMS

The degree of success of Act 250 must be assessed separately for the two distinct programs created by the Act. The state land use planning aspects of Act 250 appear to have been only marginally successful, at best. The Act calls for the development of a series of three state plans by the Board. The first, the Interim Plan, was adopted in 1972. However, this Interim Plan was little more than a statement of general policies and a series of maps showing which areas of the state had particular physical limitations to development, were especially unique or sensitive or were especially suited to agricultural or forest use.<sup>60/</sup> It is essentially a summary of basic factors which should influence the location and regulation of development, providing little in the way of actual recommendations.<sup>61/</sup> The lack of specific recommendations or decisions was probably due to the fact that Act 250 requires that all subsequent plans are to be consistent with the Interim Plan and neither the Board nor the legislature was prepared to make any irrevocable planning decisions.<sup>62/</sup>

The second plan, the Land Capability Plan, had considerably more content. The heart of this plan, however, consisted of numerous amendments to the original

Act clarifying environmental criteria for issuing permits and giving local governments more control over the type of development which could be permitted by the district commissions. While Land Capability Plan was significant in the context of permitting under Act 250, it offered little in terms of comprehensive state land use planning.<sup>63/</sup> It did have a back-door effect on land use planning, however, because it enabled municipalities to exercise much greater control over development within their boundaries if local and regional plans were adopted. As a result, local planning has experienced a modest upsurge, although less than 50% of the municipalities in Vermont have adopted local plans.<sup>64/</sup>

The final phase of the planning program under Act 250 was to be the adoption of a comprehensive state Land Use Plan. However, ten years after passage of the Act, no such plan has been adopted and the prospects of the adoption of a plan in the near future appear slim. The Board did adopt a Land Use Plan, discussed above, in 1973. However, because of the fear of local governments that their planning powers were being supplanted and the fear of landowners, both individuals and developers, that the use of their land would be severely limited by faceless bureaucrats at the state capital, the Plan was not approved by the legislature. Several subsequent attempts

to gain approval for watered-down versions of a Land Use Plan also failed.<sup>65/</sup>

The Chairman of the Environmental Board confirmed that the planning aspects of Act 250 have been only marginally successful. No effort has been made to obtain legislative approval of a Land Use Plan in the past four years and the Board does not anticipate any such effort in the near future because the climate in the legislature is very much against a state Land Use Plan. In fact, there have been moves to remove this requirement from Act 250. As an alternative, the Board is attempting to bolster regional planning efforts. There are 13 regional planning commissions in Vermont and many of these commissions are working on second generation plans. In adopting new plans, the regional and local commissions generally have adhered to the guidelines proposed in the Land Capability Plan. Therefore, even though no statewide Land Use Plan has been adopted, Vermont is experiencing much more uniform land use planning than in the past as a result of Act 250.<sup>66/</sup>

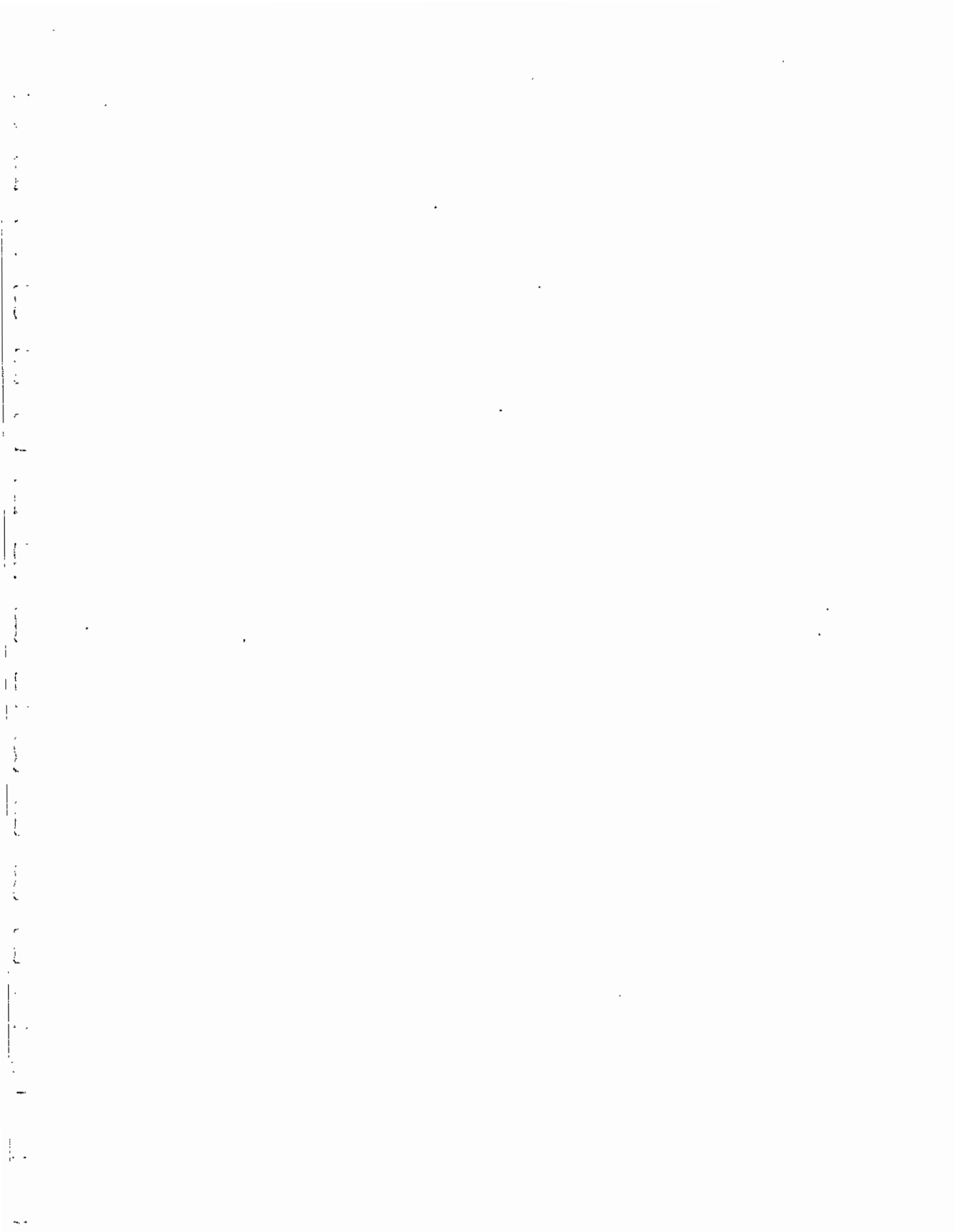
The permitting program under Act 250 has been more successful. Through mid-1978, over 3,000 permit applications had been received by the nine district commissions. Only about 80 of those applications were denied and about 150 were withdrawn for various reasons.<sup>67/</sup> The small number of permits denied, however, is not



indicative of the success or failure of the program. The district commissions can attach conditions to a permit and, in almost all instances, permits have been granted subject to conditions designed to implement the policies of the Act. In some controversial cases, a dozen or more conditions have been imposed. In many other cases, applicants have been forced to modify their plans in order to satisfy Act 250 requirements. The Act 250 permitting procedure has also served as a checkpoint to assure that developers have obtained all permits required by other state and local agencies.<sup>68/</sup>

Act 250 permitting requirements have slowed growth only a little, if at all. It is difficult to accurately assess this aspect of the program because the passage of Act 250 was followed by a national building slowdown caused by the energy crisis and tight money. However, the permitting program does appear to have improved the quality of development.<sup>69/</sup>

The program is not without problems, however. Exemptions from the law, especially the "grandfather" clause and acreage requirements have permitted much development that does not keep with the spirit of Act 250. The acreage requirements bear little relation to the potential harm to the environment a development offers. The minimum lot exemptions for subdivisions and the minimum acreage



CHAPTER 3

FOOTNOTES

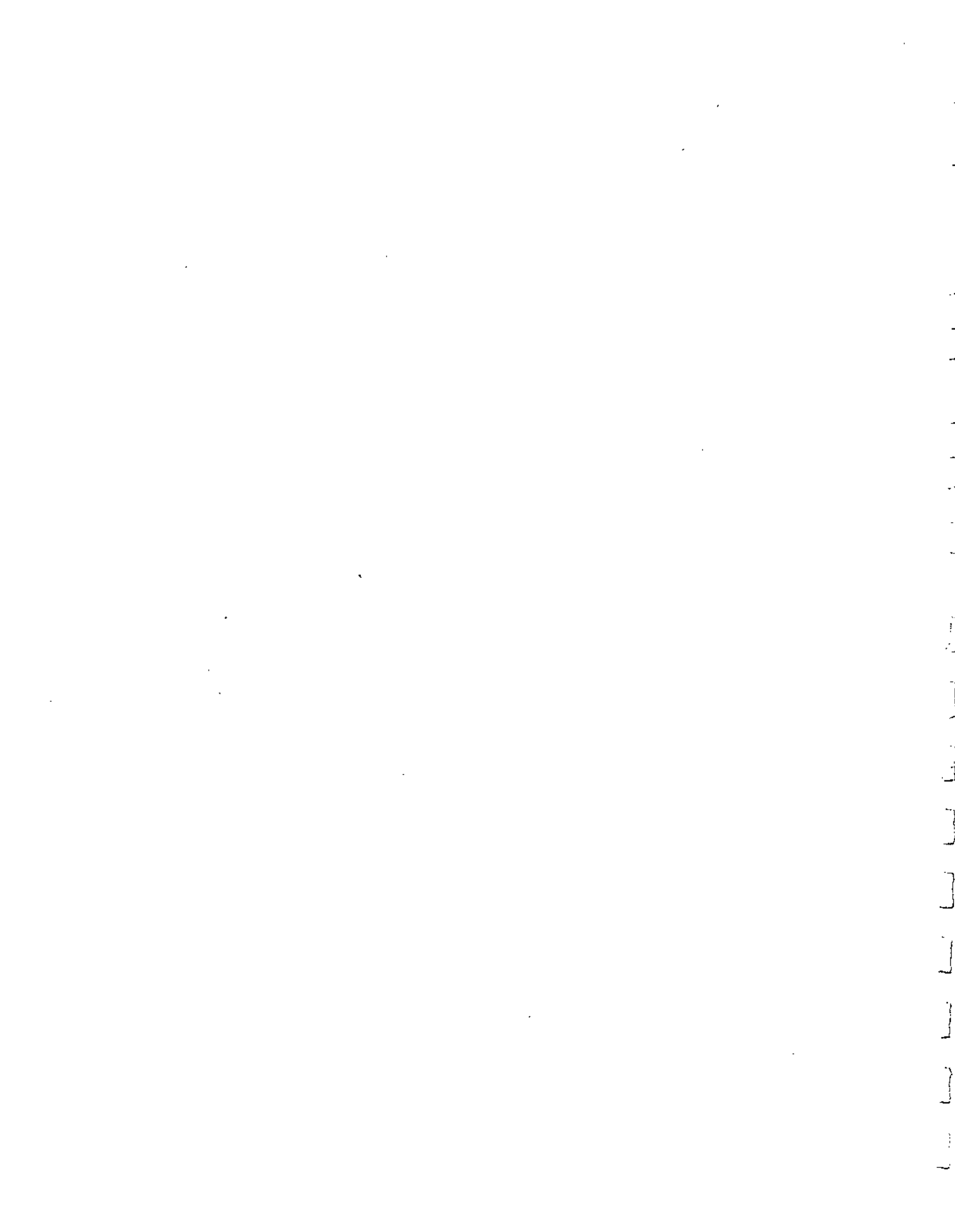
1. 10 V.S.A. §§ 6001-6091 (Supp. 1978).
2. Act of the Legislature No. 250 (1969 Adj. Sess.) § 1.
3. Ibid.
4. 10 V.S.A. §§ 6021, 6041, 6042, 6043 (1974, Supp. 1978).
5. Id. §§ 6026, 6081-88 (1974, Supp. 1978).
6. Id. § 6089(a) (Supp. 1978).
7. F. Bosselman and D. Callies, The Quiet Revolution in Land Use Control 57 (hereinafter cited as Bosselman and Callies).
8. 10 V.S.A. § 6021(a) (1974).
9. Id. § 6089 (Supp. 1978). See discussion of district commissions below.
10. Id. at §§ 6041-43 (1974, Supp. 1978).
11. Id. § 6089 (Supp. 1978).
12. Id. § 6085(c).
13. Id. § 6089.
14. Id. § 6041 (1974).
15. Ibid.
16. R. Healy and J. Rosenberg, Land Use and the States 59 (2d ed. 1979) (hereinafter cited as Healy and Rosenberg).
17. 10 V.S.A. § 6042 (1974).
18. Healy and Rosenberg at 59.
19. Ibid.
20. Ibid.
21. Id. at 60.

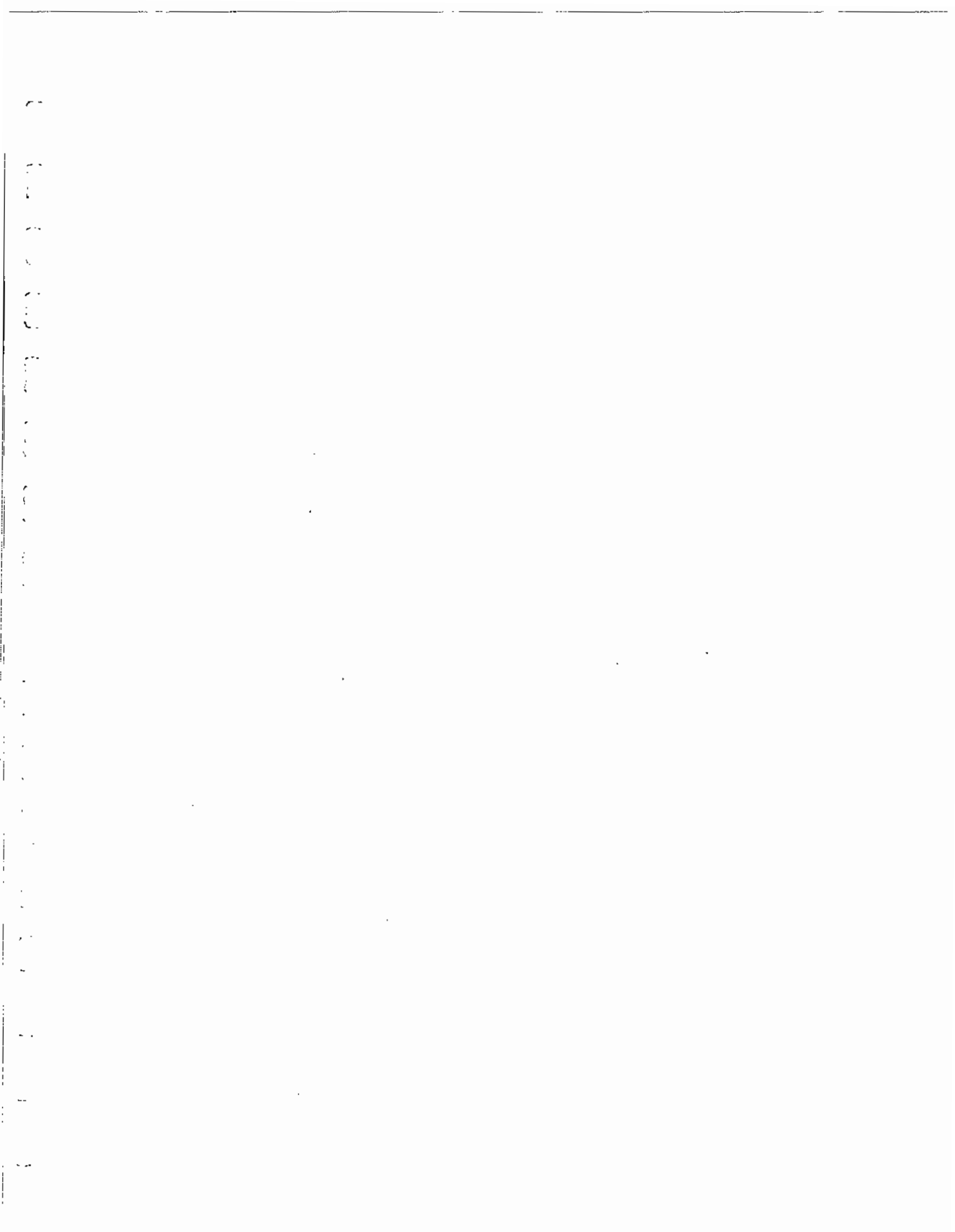
22. 10 V.S.A. § 6043 (Supp. 1978).
23. Ibid.
24. Healy and Rosenberg at 62.
25. Id. at 62-63.
26. Id. at 63-64.
27. 10 V.S.A. § 6026(b) (1974).
28. Bosselman and Callies at 59.
29. 10 V.S.A. § 6083 (1974).
30. Id. § 6001(3) (Supp. 1978).
31. Id. § 6001(19).
32. Id. § 6001(11).
33. Id. § 6083 (1974).
34. Id. § 6084(a).
35. Id. § 6084(b).
36. Id. § 6085(a).
37. Id. § 6085(b).
38. Id. § 6085(d).
39. Id. § 6082.
40. Bosselman and Callies at 62.
41. 10 V.S.A. § 6084(a) (1974).
42. Bosselman and Callies at 63.
43. 10 V.S.A. § 6086(10) (Supp. 1978).
44. Id. § 6086(a). It should be noted that paragraph (9) of this section introduces a possible problem of interpretation in that this provision requires the Commission to deny an application if it is inconsistent

with the capability plan while section 6046(b) prohibits the Commission from denying any permit that is consistent with a local plan. However, Act 250 does not require local plans to be consistent with the capability plan. Local plans need only be consistent with the state land use plan when adopted by the Board and approved by the legislature.

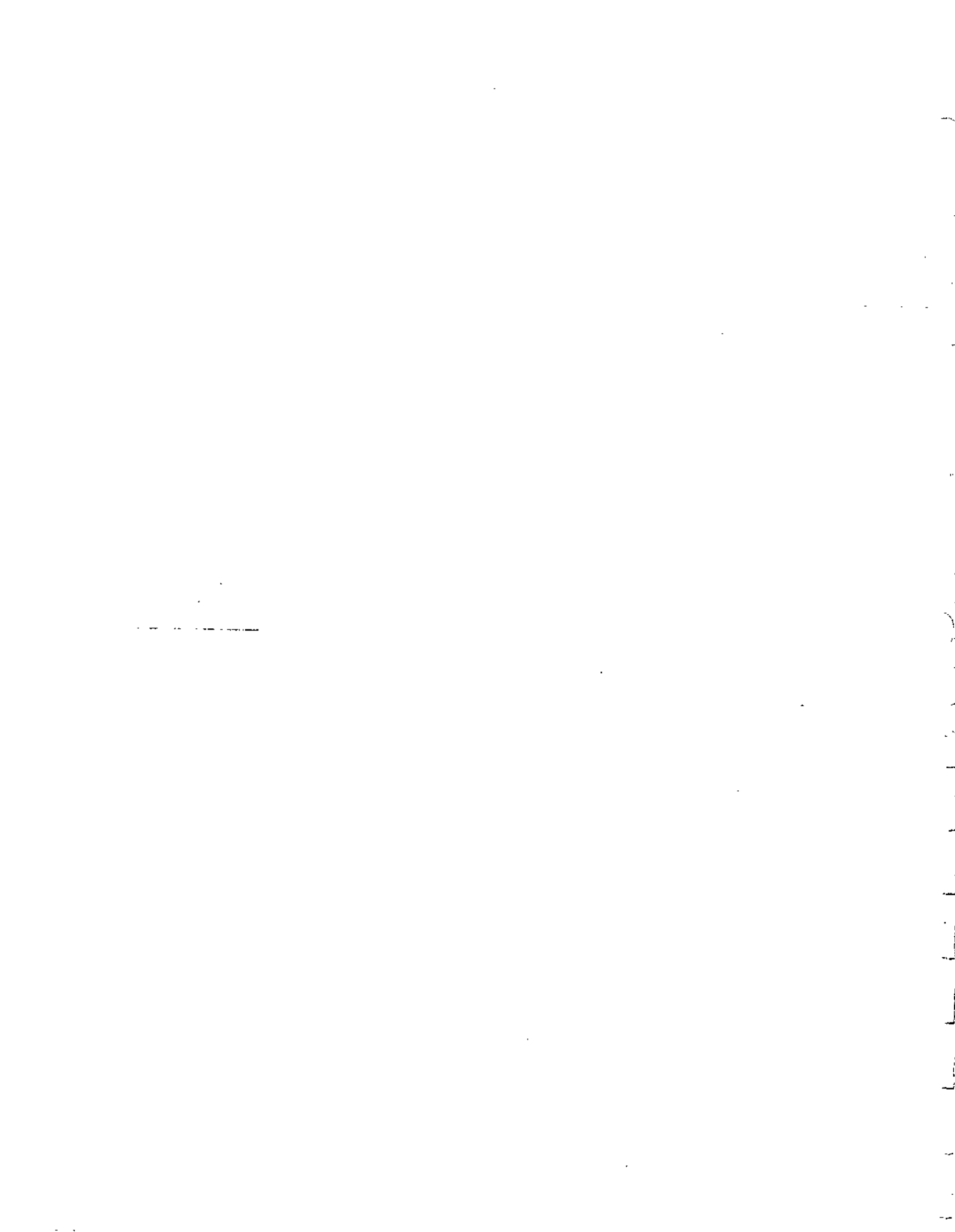
45. Id. § 6088 (1974).
46. Id. § 6087.
47. Id. § 6089 (Supp. 1978).
48. Id. § 6082 (1974).
49. Id. § 6084(b).
50. Bosselman and Callies at 62.
51. 10 V.S.A. § 6082 (1974).
52. Id. § 6086(10) (Supp. 1978).
53. 24 V.S.A. § 4321 (1974).
54. Id. §§ 4322-23.
55. Id. § 4325.
56. Id. § 4341.
57. Id. § 4342.
58. Id. § 4345.
59. 10 V.S.A. § 6045 (1974).
60. Healy and Rosenberg at 59.
61. Bosselman and Callies at 72-73.
62. Healy and Rosenberg at 59.
63. Id. at 59-60.
64. Telephone conference with Peg Garland, Chairman, Environmental Board, January 7, 1980.

65. Id. at 61-66.
66. Telephone conference with Peg Garland, Chairman, Environmental Board, January 7, 1980.
67. Id. at 46-47.
68. Id. at 47.
69. Id. at 56-57.
70. Bosselman and Callies at 80-81.
71. P. Myers, So Goes Vermont 24 (1974).
72. Telephone conference with Peg Garland, Chairman, Environmental Board, January 7, 1980.









CHAPTER 4

THE TWIN CITIES METROPOLITAN COUNCIL

I. THE PROGRAM

The availability and attractiveness of land for lake living and the movement of population into areas outside Minneapolis and St. Paul were significant factors leading to the creation of the Twin Cities Metropolitan Council (Metro Council) in 1967.<sup>1/</sup> The movement of people into the rural areas and to lakeside lands, coupled with the lack of availability of adequate water distribution and sewage collection and treatment systems led to the heavy reliance on individual water wells and septic systems for water and sewer service. However, as early as 1959 the State Health Department reported that inspections of water wells indicated they were recirculating sewage from septic tanks.<sup>2/</sup> A Minneapolis-St. Paul Sanitary District had been created in 1932 and a Metropolitan Planning Commission had been created by the State of Minnesota in 1957 to deal with regional concerns of the seven county metropolitan area. However, in wrestling with serious problems of regional concern such as the water quality and sewage treatment and disposal problems, the Metropolitan Planning Commission recognized that with its advisory nature, it was unable to translate its plans and development guides into action. Therefore, the Commission recommended that a new metropolitan council be created with review and operating powers and that the Commission

itself be abolished.<sup>3/</sup>

The Metro Council was established in 1967 to coordinate the planning and development of the metropolitan area comprising the seven counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington.<sup>4/</sup> In 1974 the legislature extended the duties and powers of the Metropolitan Council finding that:

the rapid spread of urban development in the metropolitan area presents major problems in the management and use of the natural resources of the area. The effects of development policies extend beyond municipal and county boundaries, requiring coordination throughout the metropolitan area and assistance from the state. It is the policy of the state . . . to provide for the protection of the health, safety and welfare of the people of the area and the conservation of natural resources by encouraging local governmental units to adopt and enforce sound policies regulating the subdivision, use and development of the limited land and water resources of the metropolitan area, and to provide the assistance of metropolitan and state agencies in achieving that objective. <sup>5/</sup>

## II. THE METROPOLITAN COUNCIL

### A. Nature and Composition of the Agency

The Metro Council is responsible to the legislature. Thus, it is not entirely inappropriate to characterize the Metro Council as a state administrative agency.<sup>6/</sup> However, former chairman, Albert J. Hofstede has stated that the Council is not a state agency.

It is, rather, a unique unit of local government with Area-wide limited taxing authority. However, the Council is not regional government either. It does not undertake to perform traditional governmental services normally the responsibility of county or municipal

government. 7/

The Council has 16 members from individual districts plus a chairman. 8/ The chairman is appointed by the governor and confirmed by the Senate but serves at the pleasure of the governor. 9/ The 16 members are also appointed by the governor and confirmed by the Senate but for fixed four year terms. 10/ Frequent attempts were made in the early years of the Metro Council's existence by its opponents to convince the legislature to amend the statute to provide for the election of Council members rather than gubernatorial appointment. Though some of the votes were close on this issue, they were defeated. In 1979, the Metro Council had a budget of approximately \$9.5 million to undertake its various functions including comprehensive planning, environmental management, human resources, management services, housing, transportation, and the various other administrative and operational expenses.

B. Jurisdiction and Authority

The Metro Council is the chief planning agency for the seven county Twin Cities area. The ongoing function of the Metro Council is the review and approval of various regional agency and local government plans governing development within the Twin Cities area. To this end the Council is required to prepare, adopt and periodically update comprehensive development standards to guide jurisdictions preparing plans.

1. Metropolitan Development Guide

One of the first major responsibilities of the Metro Council was to prepare and adopt a comprehensive development guide for the metropolitan area.<sup>11/</sup> The resulting document, the Metropolitan Development Guide, consists of policy statements, goals, standards, programs and maps prescribing guides for an orderly and economic development of the area. Over the years the Metropolitan Development Guide has grown into a 700 page, 2 volume work including chapters on airports, health, housing, law and justice, open space protection, recreational open space, sewers, solid waste, transportation and water resources. Two chapters which are intended to bring some coherence to the function plans and to improve the effectiveness of public investment are the Development Framework and the Investment Framework.<sup>12/</sup>

The Development Framework Chapter points to the need to maintain the high quality of life in the Metro area, to accommodate regional growth in a rational and economic manner, to determine priorities for investment in metropolitan services and facilities, to assure a supply of adequate housing at reasonable costs, to protect the environment and ensure economic growth, and to provide a framework for guiding metropolitan growth and development decisions.

In addition to stating overall goals for the metropolitan area, the Development Framework delineates specific policies applicable to five planning areas

identified by the Metro Council as within the metropolitan area. The five planning areas consist of (1) "metropolitan centers" (the centers of the core cities of Minneapolis and St. Paul and their central business districts); (2) fully developed areas including the remainders of the core cities and the first ring of suburbs; (3) "areas of planned urbanization" including the land beyond metropolitan centers and fully developed areas where future population growth is expected to be channeled; (4) 47 free-standing growth centers intended as trade centers in municipalities of various sizes; and (5) "rural service areas" which are the remaining areas now agricultural and which the Metro Council proposes remain without urban services. As an example, the Council's policy for rural service areas is set forth as follows:

Maintain commercial agriculture as the primary use of land in the rural service area. Non-agricultural land uses, such as hobby farms, residential subdivisions, recreation areas, and commercial facilities, shall be regarded as secondary land uses and should not be permitted in commercial agriculture zones. Small residential and commercial developments should be accommodated in the rural town centers that have public utilities. Housing sites in the rural service area should be platted in such a way that the property can be subdivided at a future time when utilities may become available.

In support of this policy the Metro Council would preclude the extension of metropolitan scale facilities or services into rural areas; adopt fiscal incentives to foster commercial agriculture; make counties responsible

for ensuring that plans are adopted for unincorporated areas consistent with the Metropolitan Development Framework; and adopt and enforce health and safety regulations for on-site disposal systems for non-farm development.

After setting forth the series of planning area policies, the Development Framework contains a number of steps for implementation of the policies. Five major implementation elements are identified including development planning and regulation, public facility planning and capital programming, economic incentives, tax policy, and education about metropolitan growth. The implementation program calls for a sharing of the planning and implementation responsibility by the Metro Council and local governments. The Metro Council is called on to prepare and adopt plans with respect to sewers, highways and transit, parks and protection of open space. In addition, the Council would prepare Development Guide chapters with respect to other areas including metropolitan development.

The Investment Framework is an effort to provide policy guidance to various governmental bodies in the area to make more effective use of public outlays of funds.

## 2. Review of Local Comprehensive Plans

To assure some measure of compliance by local governmental units with the policies set forth in the

Development Guide, local governmental units are required to file comprehensive plans with the Metro Council for review. School District capital improvement programs must also be submitted for Metro Council review. The Council is to review such plans for consistency with the adopted provisions of the development guide and "may require a local governmental unit to modify any comprehensive plan or part thereof which may have a substantial impact on or contain a substantial departure from metropolitan system plans."<sup>13/</sup>

However, there is much which precedes adoption of local comprehensive plans. The Metro Council is to prepare guidelines and procedures to assist local governmental units to meet the requirements imposed by regarding consistency of planning with regional policies.<sup>14/</sup> A "metropolitan system statement" is to be provided to each local governmental unit containing information relating to the unit and the surrounding area which the Council believes the unit should consider in preparing its comprehensive plan including the following:

(a) The timing, character, function, location, projected capacity and conditions on use, for existing or planned metropolitan public facilities, as specified in metropolitan system plans, and for state and federal public facilities to the extent known to the council;

(b) The population, employment and housing need projections which have been used by the council as a basis for its metropolitan system plans;



(c) Any parts of the land use plan, public facilities plan or implementation program which may be excluded from the plan of the local governmental unit. The exclusion of parts shall be based on the nature and character of existing and projected development within each local governmental unit and on policies, statements, and recommendations contained in metropolitan system plans. 15/

The metropolitan systems statement as well as any amendments thereto are to be considered by each local unit to assure consistency of local plans with metropolitan regional plans.

Within three years of receipt of a metropolitan systems statement, local governmental units are to prepare comprehensive plans to be submitted to the Metro Council for review. 16/ Any such plan must contain "objectives, policies, standards and programs to guide public and private land use, development, redevelopment and preservation" through at least 1990, and a land use plan designating "existing and proposed location, intensity and extent of use of land and water for agricultural, residential, commercial, industrial and other public and private purposes" including protection for solar access and

. . . a housing element containing standards, plans and programs for providing adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.

A public facilities plan must be included describing the character, location, timing, use and capacity of

public facilities and showing any effects on or departures from metropolitan system plans and covering at least transportation services and facilities, sewer systems and parks and recreational open space. An implementation program must be included describing the official controls to be used such as zoning and subdivision controls, a capital improvement program for public facilities and a housing implementation program designed to meet the local unit's share of the metropolitan area need for low and moderate income housing.<sup>17/</sup>

The Metro Council is to review and approve the local comprehensive plans or make suggestions for revision.<sup>18/</sup> If the local unit disagrees with the Metro Council's suggested revisions, an appeal process is provided for which requires a public hearing conducted by the state office of hearing examiners. The hearing examiner prepares a report to the Council following any hearing, and the Council makes its final decision as to whether to require the revisions. If there is still disagreement between the Council and the local unit, a further appeal can be taken to the courts.<sup>19/</sup>

Once a comprehensive plan has been adopted, local units must act in compliance with the approved plans.<sup>20/</sup> If the local unit fails to adopt a plan or the revisions suggested by the Council, the Council may commence legal action in court to compel compliance with the comprehensive planning requirements of the

statutes.<sup>21/</sup>

Even apart from the legislative authority to require local governments to bring comprehensive plans into compliance with metropolitan systems plans, the Metro Council has been successful at encouraging compliance with its established policies. As the A-95 review agency with respect to applications for federal and state funds, the Council has been quite explicit about its policy of ranking applicants in the order of their willingness to do their share to meet the regions needs for low and moderate income housing. This A-95 review power can also be used to implement the entire regional strategy.<sup>22/</sup> A 1973 draft of the Housing chapter of the Metropolitan Guide contained Policy 31 which provided:

In reviewing applications for funding assistance, high priority will be assigned to those governmental units that have codes and ordinances which provide for low-and-moderate-income housing and that are providing or have definite plans for low-and-moderate-income housing.

3. Review of Matters of Metropolitan Significance

In addition to its powers to review local comprehensive plans, the Metro Council is required to "review all proposed matters of metropolitan significance" undertaken by any private organization, local governmental unit, independent commission, board or agency or any state agency, and to establish standards and guidelines for determining whether any proposed matter is of

"metropolitan significance" and for the review of any such matters. In establishing the standards and guidelines, the Metro Council is to give consideration to all relevant factors including the impact of the proposed matter on the orderly, economic development, public and private, of the metropolitan area and its consistency with the Development Guide; the relationship of the proposed matter to the goals, standards, programs and other provisions of the Development Guide; the impact of the proposed matter on policy plans adopted by the Metro Council and the development programs and functions of the metropolitan commissions; and the functions of municipal governments with respect to land use control.<sup>23/</sup>

The Metro Council is empowered to suspend action on a proposed matter for a period not to exceed 12 months following the issuance of its determination. The Council is to review a proposed matter upon request of an affected local government or metropolitan commission, but the Council is also empowered to review all matters of metropolitan significance regardless of whether a request for review has been received. Furthermore, the Metro Council is to review all proposed matters determined to be of metropolitan significance to determine their consistency with metropolitan system plans relating to airports, waste control, transportation and recreational open space and

their adverse impact on local governmental units. <sup>24/</sup>

While it can be expected that the concept of matters of "metropolitan significance" would relate to developments or activities having a large scale, some Council members recognize that even comparatively small scale projects can have metropolitan significance. One has said "regional up to this date has always meant big; and now we're saying regional can be small." Large scale projects such as major highways, airports and regional parks may be significant in suburban areas but the closing of a street, a tot lot or the rehabilitation of a 20 unit building in the inner city may be equally significant. Thus, the issue is not simply size, but the effect of the development on metropolitan system plans.

#### 4. Review of Plans of Independent Commissions

Among the powers of the Metro Council is the power to review all long-term comprehensive plans of independent commissions, boards, or agencies which are prepared for operation and development within the metropolitan area if the Metro Council determines the plan will have an areawide effect, a multi-community effect or a substantial effect on metropolitan development. Among the commissions subject to this requirement are the Metropolitan Waste Control Commission, Transit Commission, Parks and Open Space Commission and Airports Commission. Each such plan is to be submitted to the

Metro Council before any action may be taken to place it into effect. No action may be taken to place the plan or any part of it into effect until 60 days have elapsed after its submission to the Metro Council or until the Council finds the plan to be consistent with its comprehensive development guide and the orderly and economic development of the metropolitan area. The Metro Council may within 60 days after receipt of a plan find the plan inconsistent with its comprehensive guide or detrimental to the orderly and economic development of the metropolitan area and in such case may direct that operation of the plan be indefinitely suspended. The affected agency may appeal the decision of the Metro Council suspending the plan to the entire membership in the Council for public hearing. If the affected commission and the Council are unable to agree to an appropriate adjustment of the plan, then a record of the disagreeing positions is to be made and the Metro Council prepares a recommendation for consideration by the Legislature.<sup>25/</sup>

### III. OTHER AGENCIES IN THE PROGRAM

#### A. Metropolitan Waste Control Commission

As part of its comprehensive planning responsibilities the Metro Council has been directed to prepare and adopt a comprehensive plan for the collection, treatment and disposal of sewage in the metropolitan area. The Metropolitan Waste Control Commission (WCC)

was created as the functional agency to acquire and operate sewage systems.<sup>26/</sup> The plan developed by the Council must indicate the need for sewage collection, treatment and disposal facilities in the Twin Cities area; the general type, location and timing of needed interceptors and treatment facilities; a general statement as to necessary expenditures for capital improvements; and a statement as to the relationship of the plan to local comprehensive plans and development programs.<sup>27/</sup> A comprehensive review of the plan is to be conducted at least every four years.<sup>28/</sup>

Before adopting the policy plan or any modifications to such a plan, the Council must submit the proposed plan to the WCC for its review, and the WCC is to report its comments to the Council within 60 days. The WCC may within that period request a special public hearing. In addition, any local governmental unit may request a public hearing for the purpose of receiving testimony from the local governments and the general public. Notice of such hearing must be published in a newspaper having general circulation in the metropolitan area. At any hearing interested persons are permitted to present their views on the policy plan, and the hearing may be continued from time to time. After receiving the WCC's report and holding any such hearings, the Council may revise and adopt the plan.<sup>29/</sup>

In accordance with the Council's policy plan,

the WCC is to prepare a development program for the implementation of the plan. Such program is to cover the detailed technical planning, engineering, financing, scheduling and other information necessary for implementing the policy.<sup>30/</sup> The WCC is given the power to acquire and operate those interceptors and treatment works necessary for effectuating the comprehensive plan. (Under the provision of the 1969 legislation establishing metropolitan sewer service, all existing sanitary districts and joint sewer service boards within the area were terminated and all employers and properties of such agencies were transferred to the WCC.)<sup>31/</sup> It also has the power to acquire property by condemnation for the purposes of constructing, improving and operating sewage facilities necessary for the effectuation of the plan.<sup>32/</sup> Thus, the WCC development program will include a description of the acquisitions, construction and improvements it deems necessary. In developing this program, the WCC must hold a public hearing at the request of any local government unit. The proposed program is then submitted to the Council for approval. The Council will hold a public hearing if the WCC so requests. If the Council finds the program inconsistent with the policy plan, it must disapprove the plan and return it to the WCC. The program must be approved by the Council before any capital improvements may be made and must be reviewed and revised as necessary every two years.<sup>33/</sup>



The WCC is also required to prepare a proposed budget each year including estimated revenues and expenses and capital improvement funds on hand and required to be spent during the year. The portion of the budget relative to capital improvements expenditures must be submitted to the Metro Council for its approval.<sup>34/</sup>

The Council's policy plan also affects municipal plans and programs for sewage facilities not acquired by the WCC. Before undertaking the construction of any extensions or substantial alterations to its disposal system, each local governmental unit must adopt a policy plan similar to the Council's plan. Each proposed plan must be submitted to the WCC for review and approval. Any features disapproved by the WCC must be modified in accordance with its recommendations. No construction of new sewers or disposal facilities may be undertaken unless the local governing body first finds that such action is consistent with its comprehensive plan and program as approved by the WCC. There is no provision for public hearing with respect to the adoption of these municipal plans and programs.<sup>35/</sup>

B. Metropolitan Parks and Open Space Commission

The Parks and Open Space Commission (POSC) was created by the legislature in 1974 to provide for a regional recreation open space system.<sup>36/</sup> The Council, after consultation with the POSC, municipalities, park

districts and counties in the metropolitan area, and after appropriate public hearings, is directed to prepare and adopt a long-range system policy plan for regional recreation open space. This plan is to identify generally the areas to be acquired by a public agency (i.e., a county, municipality, park district of the Council) to meet the outdoor recreation needs of the area, and establish priorities for acquisition and development. Before adopting the proposed policy plan, the POSC is to review it and report its comments to the Council. After receiving the POSC's report and holding a public hearing, the Council may revise and adopt the plan.<sup>37/</sup> At least every four years the policy plan is to be reviewed.

Each park district and each county not entirely within a park district must prepare a master plan for the acquisition and development of regional recreation open space which is consistent with the Council's policy plan. The Council, with the advice of the POSC, reviews each master plan. If it finds that such a plan is not consistent with the Council's policy plan, it returns the plan to the submitting district or county for revision.<sup>38/</sup>

Any park district or municipality has the power to acquire, develop and manage any land or water area for regional recreation open space.<sup>39/</sup> The Council has the power to make grants to any such municipality

or park district to cover the cost, or part of the cost, of acquiring or developing such open space in accordance with the policy plan.<sup>40/</sup> In addition, the Council is vested with the same powers as a county to acquire any land or water area included in its policy plan whenever a municipality, park district or county has failed to do so. (However, the Council is not given the power of eminent domain). In such cases, the Council will direct the POSC to proceed with the acquisition and to manage such areas for future recreation open space purposes.<sup>41/</sup>

C. Metropolitan Transit Commission

The 1974 legislative reorganization now makes the Transit Commission (MTC),<sup>42/</sup> which had been an autonomous, a public corporation and political subdivision of the state, an agency subject to the Metro Council's authority whose function is to advise the Council in preparing its transportation policy plan,<sup>43/</sup> and to develop a transportation development program, subject to the Council's approval, for the implementation of that policy.<sup>44/</sup>

The legislature directed that the Council adopt a transportation policy plan as a part of its comprehensive development guide which is to include policies relating to all forms of transportation.<sup>45/</sup> The Council is also the designated planning agency for any long-range comprehensive transportation planning

required by any federal transportation laws. As part of its duties, the Council is to "assure administration and coordination of transportation planning with appropriate state, regional and other agencies, counties and municipalities." To this end, the Council, together with the MTC, is to establish an advisory body consisting of citizens, and municipality, county and appropriate state agency representatives.<sup>46/</sup>

In developing the policy plan, the Council may request the technical assistance of the State Highway Department and affected counties and municipalities, as well as that of the MTC. Before the Council may adopt the plan, it must submit the proposed plan to the MTC for review and follow the same review, public hearing and adoption procedure applicable to WCC and POSC plans.<sup>47/</sup> After receiving the MTC's comments and holding a public hearing if the MTC so requests, the Council may adopt the plan.

The MTC must then prepare a development program to implement the plan.<sup>48/</sup> In preparing the program the MTC is directed to consult with counties and municipalities in the metropolitan area, the State Highway Department and the State Planning Agency. This program is to provide for the coordination of routes and operations of all transportation facilities. To be included, among other things, are "the approximate cost, the relation to other existing and planned trans-

portation routes and facilities, and a statement of the expected general effect on present and future use of the property within the corridor."<sup>49/</sup> As with the development program prepared by the WCC and POSC, the transportation development program must also include a review and description of the public need for the improvement, the alternatives, and the environmental and social effects of the improvement.<sup>50/</sup>

In preparing the program, the WTC is to hold a public hearing if a local governmental unit so requests. The development program must be submitted to the Metro Council which, if requested by the MTC, will hold a public hearing. The Council may approve or disapprove the program.<sup>51/</sup>

The MTC has the power to acquire, by gift, purchase or condemnation, property (or interests in property) for transportation purposes. Specific Metro Council approval is required before the MTC acquires any existing public transportation system.<sup>52/</sup>

With respect to a highway development within the metropolitan area, the Metro Council has the final word. It has the power to review and approve highway projects proposed by both local government units and the State Highway Department. Before acquiring land for or constructing a controlled access highway, a statement describing the proposed project must also be evaluated by the MTC in relationship to the development

program, and it makes recommendations to the Metro Council. No such highway project may be undertaken without the approval of the Council.<sup>53/</sup>

D. Tax Sharing Program

Another important element in the successful operation of the Twin Cities regional planning strategy is the "fiscal disparities" law, a program designed to share gains in the property tax base of the region with all municipalities.<sup>54/</sup> One thing leading many municipalities to actively seek development is the desire to increase the property tax base to increase municipal tax revenues. Even though a particular development, such as an industrial park or shopping center, may impose substantial burdens on a number of communities, the usual property tax system in the United States gives the benefit of the increased property tax base to the community in which the development is located.

Recognizing that competition for tax base among municipalities can work against coordinated, regionwide planning, the Minnesota legislature adopted a tax sharing arrangement for the seven county Metro Council area having the following objectives:

- (1) To provide a way for local governments to share in the resources generated by the growth of the area, without removing any resources which local governments already have;

- (2) To increase the likelihood of orderly urban development by reducing the impact of fiscal considerations on the location of business and residential growth and of highways, transit facilities and airports;
- (3) To establish incentives for all parts of the area to work for the growth of the area as a whole;
- (4) To provide a way whereby the area's resources can be made available within and through the existing system of local governments and local decision making;
- (5) To help communities in different stages of development by making resources increasingly available to communities at those early stages of development and redevelopment when financial pressures on them are the greatest;
- (6) To encourage protection of the environment by reducing the impact of fiscal considerations so that flood plains can be protected and land for parks and open space can be preserved; and
- (7) To provide for the distribution to municipalities of additional revenues generated within the area or from outside sources pursuant to other legislation. 55/

The essence of the tax sharing program is that 40% of the net gain in the valuation of the seven county area's commercial and industrial property over the base year 1971 is placed in a regional pool and allocated to all local governments based on population weighted by each jurisdiction's fiscal capacity. The remaining taxes go to the jurisdiction in which the development is located. It has been estimated that in 1980, 13% (\$328 million) of the region's tax base will be shared by all municipalities and that figure is expected to grow in future years. 56/

IV. LOCAL GOVERNMENT PARTICIPATION

As discussed above, the Metro Council role vis-a-vis local government is to review comprehensive or land use plans for consistency with development guidelines adopted by the Council. Although the Metro Council is empowered to require local governments to adopt comprehensive plans which are consistent with the areawide policies promulgated by the Council, the basic function of detailed planning and administration of land use controls remains in the hands of local government. Thus, although the power of local governments to do as they wish in regulating land use is clearly circumscribed, they do have a very important responsibility in implementing the overall land use policies in the Twin Cities area.

V. EXPERIENCE AND ANALYSIS

The regional planning approach embodied in the Metro Council structure appears to be working quite effectively in the Minneapolis-St. Paul area. In a paper prepared for the National Academy of Public Administration, two professors of the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota recently observed:

1. While it is extremely difficult to measure its effectiveness, the [Twin Cities] strategy appears to be working. It is giving coordinated direction to regional services, it is resolving major policy conflicts, and it is giving the region an enlarged understanding of its needs and potentials.



2. The heart of the strategy -- the Metropolitan Council -- is firmly in place and, barring an unanticipated shift in public attitude, will remain a permanent planning and coordinating mechanism for the seven-county Twin Cities metropolitan region.

3. The strategy has brought coherence to the region's efforts to deal with local problems that are larger than what can be dealt with by local governments acting independently.

4. The Metropolitan Land Planning Act -- under which the Council sets a framework of regional systems and local governments draft long-range plans consistent with those systems -- is an extraordinarily ambitious planning program worthy of close monitoring for its potential value as a model that might be adapted elsewhere.

5. The two-tier arrangement -- under which the Council sets broad policies for the region and other jurisdictions implement them within the context of the regional policies -- is a possible model for regional governance that should be closely monitored for its effectiveness and for replicable potential.

6. While still imperfect and not fully realized, the strategy is evolving a productive accommodation between central regional direction and retention of local autonomy.

7. The property tax-base sharing program is significantly reducing the disparities among the region's governmental jurisdictions and holds enormous promise over the long term for providing a solid revenue base for the region.

\* \* \*

10. The single most important factor in the strategy's success is its sustained and mutually responsive relationship with the Minnesota State Legislature. The Legislature's willingness to devolve a significant measure of state power, without referendum, is the primary and indispensable source of the strategy's viability.

11. The Metropolitan Council's creative use of the A-95 review and of its authority to allocate state and federal funds to local

jurisdictions provides an extremely significant implementation linkage which demonstrates one possible route to a stronger federal-state-local relationship.

12. Extensive citizens involvement in the strategy -- through advisory bodies and citizen organizations (most notably the Citizens League) -- is a continuing source of vitality. The interplay with the public provides a constant infusion of new viewpoints and helps keep the strategy politically feasible. .. 57/

The demographic and economic make up of the Twin Cities area suggests that perhaps the structure which has evolved and largely become accepted there may not be so easily replicated elsewhere. It is an area with low density of population compared with other urban areas and there is a great concern about urban sprawl. The population is relatively homogeneous having little experience with the racial and cultural tensions facing so many urban areas. Per capita income and educational levels are among the higher levels in the country while unemployment is low. In addition, the existence of the tax sharing arrangement serves to some extent to reduce the intense rivalry among local jurisdictions which exists in other areas for tax base.

The Twin Cities strategy does provide a means of developing a coordinated regional policy toward development without simply taking away the powers and responsibilities of local governments in controlling land use. It has been criticized for not giving suffi-

cient attention to the problems of fully developed central cities, concentrating most of its focus on problems of sprawl and developing areas. A Metro Council Task Force reported in early 1977:

A more economic and orderly suburban development process was also seen as a way to assist the older developed areas . . . . In fact, the Development Framework plan and its policy based forecasts for population, households, and employment for 1990 are premised on continued vitality and modest growth for the Metropolitan Centers and the Fully Developed Area. However, without programs and policies which give at least equal attention to the older developed areas and to existing development, even modest growth in the Fully Developed Areas is unattainable. Unless the reinvestment and maintenance half of the guided growth concept can be made to work, metropolitan growth will go predominately into the developing communities . . . . The Fully Developed Area Task Force strongly believes that for the [Metro] Development Framework plan and its policy based forecasts to be achieved, current development incentives need to be changed . . . . Regional urban development policy for the Fully Developed Area is not being achieved. (Emphasis added) 58/

However serious this shortcoming may be in the Twin Cities area, it may well be irrelevant to the situation of the Pinelands where fully developed central cities do not exist.

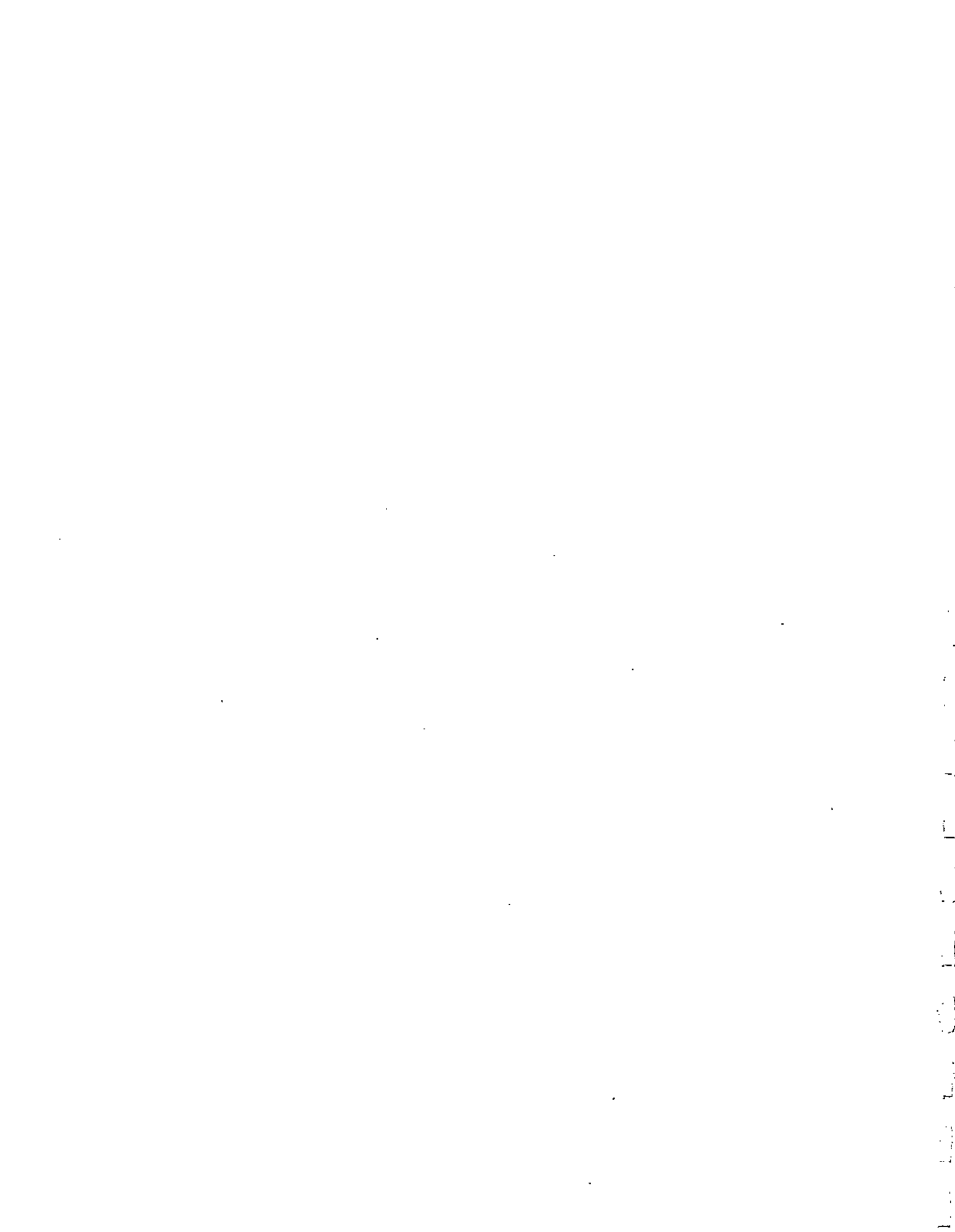
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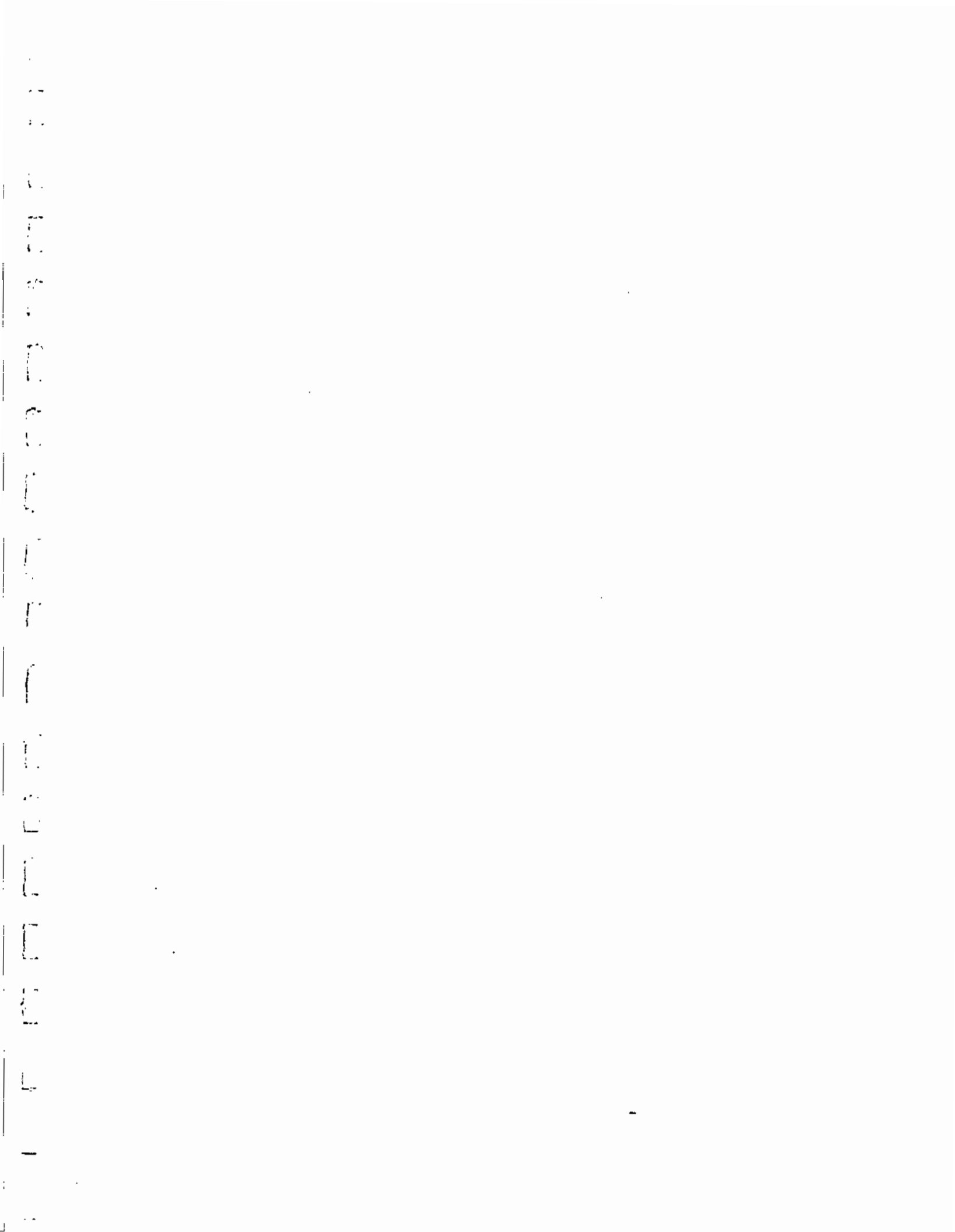
FOOTNOTES

1. "Growth Without Sprawl." Report prepared by Citizens League Planned Unit Development Committee, approved by Citizens League Board of Directors, September 19, 1973, at pp. 7-12.
2. Stanley Baldinger, Planning and Governing the Metropolis, The Twin Cities Experience, New York: Praeger Publications, 1971, at pp. 77-78.
3. Prepared statement of Albert J. Hofstede, Chairman, Metro Council, Before the Subcommittee on Urban Affairs, Joint Economic Committee, Congress Hearings on Regional Planning Issues, May 26, 1971, at p. 750.
4. Minn. Stats. ch. 473.
5. Minn. Stat. §473.203 (1977).
6. See "Regional Government Arrangements in Metropolitan Areas," supra, at p. 26.
7. Prepared statement of Albert J. Hofstede, supra, at p. 754.
8. Minn. Stat. Ann. §473B.02, Subd. 3 (1974 Supp.).
9. Id. §473.123(4).
10. Id. §473.123(2).
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14. Id. §473.854.
15. Id. §473.855.
16. Id. §473.858.
17. Id. §473.859.
18. Id. §473.175.
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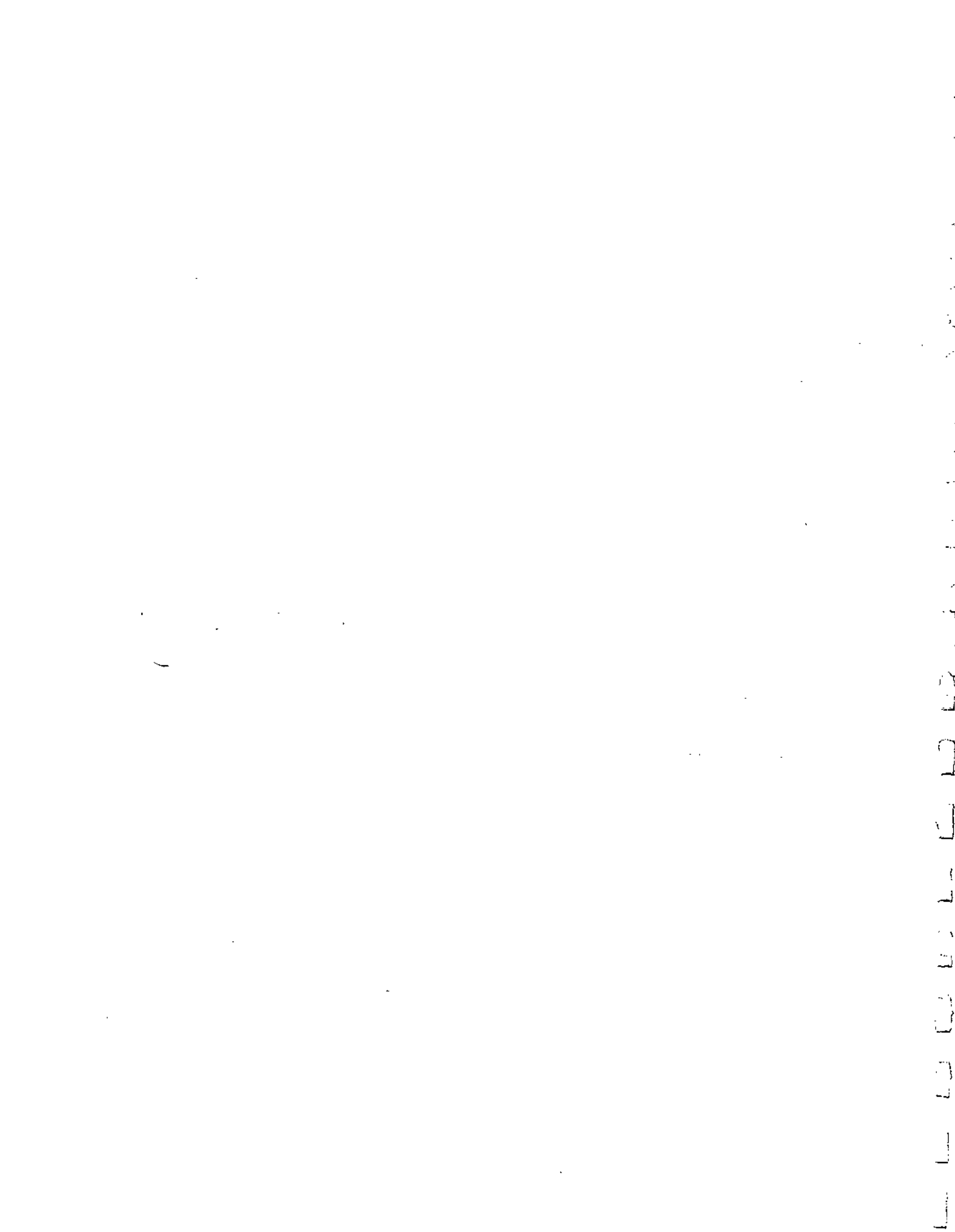
22. Arthur Naftalin and John Brandl, The Twin Cities Regional Strategy, paper prepared for State and Regional Strategy Development Project, National Academy of Public Administration (January 3, 1980), at p. 53.
23. Minn. Stat. §473.173, Subd. 3.
24. Id. §473.173, Subd. 4.
25. Id. §473.165.
26. Id. §473.506.
27. Id. §473.146, Subd. 1.
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29. Id. §473.146.
30. Id. §473.161.
31. Id. §473.511, Subd. 3.
32. Id. §473.504.
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35. Id. §473.513.
36. Id. §473.303.
37. Id. §473.147.
38. Id. §473.313.
39. Id. §473.331.
40. Id. §473.315.
41. Id. §473.333.
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43. Id. §473.146, Subd. 3.
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49. Id., Subd. 1.
50. Id. §473.161.
51. Ibid.
52. Id. §473.405.
53. Id. §473.167.
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55. Id. §473F.01.
56. Arthur Naftalin and John Brandl, supra note 22, at 12.
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CHAPTER 5

ADIRONDACK PARK AGENCY

I. THE PROGRAM

The Adirondack Park is located in northern New York and includes nearly six million acres extending over parts of thirteen counties. The state owns only about 40 percent of the park lands. Because much of the privately held land is owned by a few large landowners, the state became concerned that increased and unplanned development would destroy the natural environment of the park area. As a result, in late 1968, the governor appointed a study commission to recommend appropriate measures to assure that the development of the private land is appropriate and consistent with the long-range well-being of the Park. The recommendations of this study commission led to the enactment of the Adirondack Park Agency Act.<sup>1/</sup>

The state legislature found that

[t]he Adirondack Park is abundant in natural resources and open space unique to New York and the eastern United States. The wild forest, water, wildlife and aesthetic resources of the park, and its open-space character, provide an outdoor recreational experience of national and international significance. Growing population, advancing technology and an expanding economy are focusing ever increasing pressures on these priceless resources.<sup>2/</sup>

The legislature reasoned that this unique area was being "jeopardized by the threat of unregulated development of . . . private lands" and that "local governments in the Adirondack Park find it increasingly difficult to cope with unrelenting pressures for development being brought to bear on the area, and exercise their discretionary powers to create an effective land use development control framework."<sup>3/</sup> As a result, the legislature created the Adirondack Park Agency and authorized it to draft master plans for the development of state and privately owned lands in the Park, to review and approve plans for certain types of developments in the Park and to cooperate with local government units in establishing comprehensive development plans for individual municipalities within the Park.

## II. THE ADIRONDACK PARK AGENCY

Primary responsibility for implementing the policies of the Act lie in the Adirondack Park Agency. The Agency is a part of the executive department and is comprised of the commissioner of environmental conservation, the secretary of state, the commissioner of commerce and eight members appointed by the governor with the advice and consent of the Senate. Five of the eight members appointed by the governor must be full-time residents of the Adirondack Park area and no two members may be residents

of the same county. The three remaining appointees must be residents of the state outside of the Adirondack Park. All appointments are for terms of four years.<sup>4/</sup>

The Agency does have its own staff, including about 42 people, and its own budget.<sup>5/</sup> In addition, the Agency is authorized by statute to utilize the staff and facilities of existing state agencies to the extent feasible.<sup>6/</sup>

The Agency has authority only over the lands within the Adirondack Park. With respect to these lands, the Agency is authorized to exercise both a planning and a permitting function. First, the Agency is responsible for developing a master plan for the management of state owned lands within the Park.<sup>7/</sup> Second, the Agency is charged with the development of a land use and development plan applicable to all non-state owned lands within the Park with which local governments are expected to comply.<sup>8/</sup> Third, the Agency is authorized to approve land use plans adopted by towns and villages within the Park.<sup>9/</sup> Finally, the Agency is empowered to review and issue permits for certain types of development on non-state owned land within the Park.<sup>10/</sup> Where local governments have adopted land use plans approved by the Agency, the Agency's permitting authority is shared with the local government. The Act has been challenged in the courts on numerous constitutional

grounds and, thus far, has been able to withstand all such attacks.<sup>11/</sup>

A. Management Plan for State-Owned Land

Management and development of the more than 2.25 million acres of state-owned land is governed by a master land use plan completed by the Agency in June, 1972. This plan classifies all state-owned lands according to characteristics and capacity to withstand use into seven basic categories: wilderness; primitive; canoe; wild forest; intensive use; wild, scenic and recreational rivers; and travel corridors. The plan specifies the types of development to be allowed in each category. For example, in wilderness areas the only development allowed is scattered lean-tos, foot and horse trails and associated bridges and necessary directional, informational and interpretive signs. All other structures and improvements are being phased out. Very little development, with the exception of primitive recreational facilities, is permitted on any of this state owned land. The state land is to be the primary contributor to the open space character of the Adirondack Park.<sup>12/</sup>

B. The Land Use and Development Plan

Development of non-state-owned land within the Park is regulated by the Adirondack Park Land Use and Development Plan. All non-state-owned land within the

Park is divided into six land use areas -- hamlet, moderate intensity use, low intensity use, rural use, resource management and industrial use. The plan describes the character of each of these areas and establishes allowable uses and overall density requirements. This plan classifies non-state-owned land into broad classifications reflecting regional values and considerations. Detailed local level planning is left to the local governments within the Park.

Hamlet areas, as established by the plan, are the Park's existing community and population centers. These areas will serve a wide variety of residential, commercial, recreational, social, industrial, professional and public purposes. The plan establishes no overall intensity guideline for hamlet areas.<sup>13/</sup>

Moderate and low intensity use areas are designed primarily as residential areas. Moderate intensity areas oftentimes will serve as expansion areas for the Park's hamlets. Overall intensity of development should not exceed approximately 500 principal buildings per square mile in moderate intensity areas or 200 principal buildings per square mile in low intensity areas.<sup>14/</sup>

The rural use and management areas established by the plan are designed to protect the large non-state-owned open space areas within the Park. These two classifications constitute more than 80 percent of the non-state lands

within the Park. Resource management areas are generally remote from settled areas and are particularly likely to contain large areas of fragile resources. These areas are primarily devoted to agriculture and forestry.<sup>15/</sup>

Industrial use areas include those portions of the Park where major industrial and mineral extraction operations presently exist and areas where local or state officials have identified sites that are suitable for new industrial development. There is no overall intensity guideline applicable to industrial use areas.<sup>16/</sup>

While specifically allowable primary and secondary uses are listed for each land use area, the lists are not absolute. These lists are designed to provide guidelines for development, but, if a project sponsor can satisfactorily carry the burden of demonstrating to the Agency (if a permit from the Agency is required) or to the local government (if a local permit is required) that a proposed use is compatible with the land use area, the proposed use can be authorized. Similarly, the plan regulates only the overall intensity of development rather than requiring specific or uniform lot sizes. This approach was taken to allow the location of buildings to be determined after consideration of the particular area involved. In many cases, clusters of buildings in suitable areas will ease the burden placed on government units in providing

public services and allow larger blocks of land to be left in their natural state. The precise manner of complying with the overall density requirements is left to the discretion of the regulatory agency with jurisdiction over the land involved.

The plan also provides specific restrictions with respect to the development of shoreline property. The shoreline restrictions apply to all new development of land in the Park regardless of whether the activity is otherwise subject to the review jurisdiction of the Agency or of any other government agency.<sup>17/</sup> The shoreline restrictions are similar to restrictions found in traditional land use control plans. Varying minimum lot widths and building setbacks are established for all land use areas except industrial use areas. The restrictions also limit the amount of vegetation that may be removed on shorefront lots by limiting the cutting of trees in excess of six inches in diameter within 35 feet of the mean high-water mark and by strictly limiting the cutting of any vegetation within six feet of the mean high-water mark. In addition, the plan establishes intensities of principal buildings per linear mile of shoreline in order to encourage clustering of buildings.<sup>18/</sup>

C. Approval of Local Land Use Plans

The Agency is authorized to review and approve



any local land use programs proposed by local governments and submitted by the local governments for Agency approval.<sup>19/</sup> The Act does not, however, invalidate any local planning or zoning regulations, regardless of whether they have been approved by the Agency, nor does it require local governments to submit local plans and zoning regulations to the Agency for approval. The Act does provide benefits to the governments of localities which have obtained Agency approval of their land use programs.

If a local government submits its land use program to the Agency for approval, action must be taken by the Agency within 90 days. If no action is taken within the 90-day period, the plan will be deemed approved.<sup>20/</sup> The Agency is to approve a local land use program if it determines that the program meets the following criteria:

- (a) it is in furtherance and supportive of the Land Use Development Plan;
- (b) it is compatible with the character and purposes described in the land use plan;
- (c) it reasonably applies the overall intensity guidelines set out in the plan;
- (d) it reasonably applies the classification of compatible uses listed in the Agency plan;
- (e) it incorporates the shoreline restrictions as described in the Agency plan;
- (f) it requires review of Class B regional projects (Class A and B project review is discussed in Part D below); and
- (g) it contains adequate authority and provision for its

administration and enforcement.<sup>21/</sup> In reviewing local land use programs, the Agency should consult with appropriate public agencies and provide an opportunity for the Adirondack Park Local Government Review Board and appropriate county and regional planning agencies to review and comment on the program.<sup>22/</sup> The Agency is authorized to separately review and approve significant components of a local land use program if the local government submits separate components for approval.<sup>23/</sup>

The Act is designed to encourage the development of local land use programs. In furtherance of this goal, the Agency is instructed to encourage and assist local governments in preparing local land use programs. This assistance is to take the form of the provision of data, technical assistance and model provisions.<sup>24/</sup>

D. The Agency's Permitting Authority

The Agency is given authority to review and approve all Class A regional projects and all Class B regional projects in any land use area not governed by an Agency-approved local land use program. Where an Agency-approved local land use program is in effect, Class B regional projects are approved by the local authorities.<sup>25/</sup> Projects other than Class A and B regional projects are reviewed locally pursuant to local land use regulations. Class A and B regional projects are defined separately for

each land use area. Class A projects generally are larger and more critical from a resource standpoint and have potentially greater impact on their immediate and surrounding environment than do Class B projects.<sup>26/</sup> For example, in hamlet areas Class A projects include all development involving wetlands, all development involving one hundred or more lots and all structures in excess of forty feet in height.<sup>27/</sup> No Class B projects are designated in hamlet areas. Class A projects in Resource Management Areas include all development in designated critical areas, all development involving two or more lots and all structures in excess of forty feet in height.<sup>28/</sup> Class B projects in the Resource Management Areas include single-family dwellings, municipal roads and hunting and fishing cabins.<sup>29/</sup>

Any person proposing to undertake such a project must apply to the Agency for approval and receive a permit before taking any steps toward development. Upon receipt of such an application, the Agency is to give notice to the Adirondack Park Local Government Review Board, the chairman of any county planning board with jurisdiction over the area, the appropriate regional planning board and the local government with jurisdiction over the area.<sup>30/</sup> The Agency may, but need not, schedule a public hearing. A public hearing should be held, however, if, based on the comments of the Local Government Review Board, local

officials or the public, the Agency determines that the project raises substantive and significant issues relating to any findings or determinations the Agency is required to make before granting a permit.<sup>31/</sup> The Act sets out strict time limits for completion of the Agency's review in cases where hearings are held and where the Agency rules on the application without holding a hearing.

The Agency cannot approve any Class A project within a land use area governed by an approved local land use program unless it determines that the project meets all of the significant requirements and conditions of the local land use program.<sup>32/</sup> The Agency cannot approve any project to be located in an area not governed by an approved local land use program unless it determines that: (a) the project would be consistent with the Agency's land use and development plan; (b) the project would be compatible with the character description of the land use area; (c) the project would be consistent with the overall intensity guidelines for the land use area involved; (d) the project would comply with any applicable shoreline restrictions; (e) the project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park.<sup>33/</sup> The Agency is authorized to impose any requirements or conditions in granting a permit that are necessary to

assure that the project will not have an adverse effect on the overall use of the Park.<sup>34/</sup>

### III. OTHER AGENCIES INVOLVED IN THE PROGRAM

The Adirondack Park Agency Act does not provide that the permit requirement for Class A and B regional projects in the Act is to be in place of any other permits or approvals required from other state or local agencies. Consequently, such projects may require the approval of other state agencies. These state agencies do not, however, play any role in the administration or enforcement of the land use program established by the Adirondack Park Agency Act.

In addition to the Adirondack Park Agency, the Act creates the Adirondack Park Local Government Review Board. The purpose of this Board is to advise and assist the Park Agency in carrying out its functions. The Board is comprised of twelve members, each of whom must be a resident of a county wholly or partly within the Park. No more than one member shall be a resident of any single county. Each member is to be appointed in the manner determined by the legislative body of each participating county. The members of the Board serve terms as determined by their respective appointing authorities.<sup>35/</sup> The Board is to monitor the administration enforcement of the

Adirondack Park Land Use and Development Plan and periodically report and make recommendations to the governor and state and county legislatures regarding the effectiveness of the plan.<sup>36/</sup> In addition, the Review Board is to receive notice of all applications for permits and is given an opportunity to comment thereon before the Agency makes a final determination.<sup>37/</sup> It is also to consult with the Agency before the Agency approves or disapproves any local land use programs submitted by local governments within the Park.<sup>38/</sup>

The New York Department of Environmental Conservation exercises a significant role in administering the Adirondack Park's state land master plan. The Department is charged with the responsibility of overseeing the development of and managing most state-owned land within the Park. The master plan was developed by the Agency only after lengthy consultation with the Department and it is the Department's responsibility to see that the policies of the master plan are carried out.

#### IV. LOCAL GOVERNMENT PARTICIPATION

As noted above, the land use requirements of the Act do not supplant local zoning and planning programs. The Land Use and Development Plan prepared by the Agency considers primarily the regional impact of development of lands within the Park. Specific zoning requirements

are still the responsibility of local governments and any project must obtain all permits and approvals required by local law, regardless of whether they have been approved by the Agency.

Local land use and zoning programs need not be submitted to the Agency for approval and land use programs are not invalidated because they are inconsistent with the Agency's land use plan. However, local programs may be submitted to the Agency for its approval<sup>39/</sup> and, in order to encourage local governments to adopt land use programs that are consistent with the Agency's land use plan, the Act provides that if a local land use program is submitted to and approved by the Agency, the local government is authorized to take over the responsibility of granting permits for Class B regional projects within its jurisdiction.<sup>40/</sup> In a situation where no local land use program has been approved by the Agency, any development which is subject to the Agency's jurisdiction will have to be approved by both the Agency and any appropriate local agencies. A project approved by the Agency can still be rejected by a local government, although a project disapproved by the Agency cannot be initiated regardless of any local government approval.

V. SUCCESSSES AND FAILURES OF THE PROGRAM

The program established by the Adirondack Park Agency Act has been implemented as intended, at least to the extent that the implementation was the duty of the Adirondack Park Agency. Land use and management plans regulating the development of state-owned and non-state-owned lands within the Park have been adopted by the Agency and projects within its jurisdiction have been reviewed in order to assure that they comply with both the letter and spirit of the plans. However, because of the amount of land involved and the complexity of the planning details established by the Agency in its land use plans, all of the policies of the Act cannot be implemented unless the towns and villages within the Park adopt their own plans which are consistent with the Agency's master plan.<sup>41/</sup>

The program has not met with widespread local acceptance, however. One indication of the lack of local acceptance is the fact that only seven of 107 local governments have adopted local planning programs which have been approved by the Agency.<sup>42/</sup> However, a spokesman for the Agency indicated that most development in the Park takes place in about one-half of the Park's towns. As a result, most towns have no need to seek approval of plans by the Agency. Although there was local hostility at the inception of the programs, the Agency is getting significant local cooperation



where it is necessary.<sup>43/</sup>

It is difficult to evaluate the success of the permitting program except as is reflected in the number of permits issued or denied and the number of conditions imposed on those permits which were issued. Of all the projects reviewed by the Agency, less than two percent of the applications submitted were disapproved. About five percent were voluntarily withdrawn, probably as an acknowledgment by project sponsors that the projects would not be approved. There is no way to determine, however, how much development which otherwise might have gone forward never reached the planning or application stage by reason of the existence of the Act.<sup>44/</sup> The fact that very few applications have been denied by the Agency is not indicative of the value of Agency review, however, because the Agency frequently attached special conditions to the permits it approved. The conditions generally employed have involved limits on the maximum number of new buildings permissible on the site in order to assure that overall intensity guidelines are met, restrictions on the location of buildings and criteria for the installation of on-site sewage disposal systems. Special attention has also been given to vegetative screening of improvements and location requirements for roads, drainage and utilities.<sup>45/</sup> Thus, while quantity of development may not have been affected

by the Act, quality of development probably has been improved.<sup>46/</sup>

As noted above, the constitutionality of the Act has been upheld by the few courts which have considered this issue. However, there is growing criticism of the Agency and increasing demands for substantial changes in its operations. The Adirondack Park Local Government Review Board, the agency created to serve as a "watchdog" of Agency action, has made numerous recommendations for changes in the Act in order to assure that large-scale regional development is properly planned and guarded, while protecting the rights of individual property owners and their local officials. The first major recommendation of the Review Board is to exclude from Agency jurisdiction all single-family dwellings and five-or-less-lot subdivisions unless they are located within areas of critical environmental concern. The Review Board has noted that a disproportionate number of projects reviewed by the Agency fall into these two categories while the environmental impact of such developments is often not significant. An Agency spokesman, however, indicated that the Agency is opposed to this change and that there is little chance of its being adopted. The Agency's position is that the program's success depends on its being able to keep overall control of development in the Park, including seemingly

harmless small residential development. The Agency is striving to streamline the permitting procedure for this type of small development.<sup>47/</sup> The second major revision of the Act suggested by the Review Board is that all property owners be compensated if they are prohibited from constructing even a single-family dwelling on an existing lot. The Review Board recommended that the determination of the amount of compensation be made in the same manner as any other state acquisition where a property owner is willing to sell.<sup>48/</sup> This proposal is also not likely to be enacted.<sup>49/</sup>

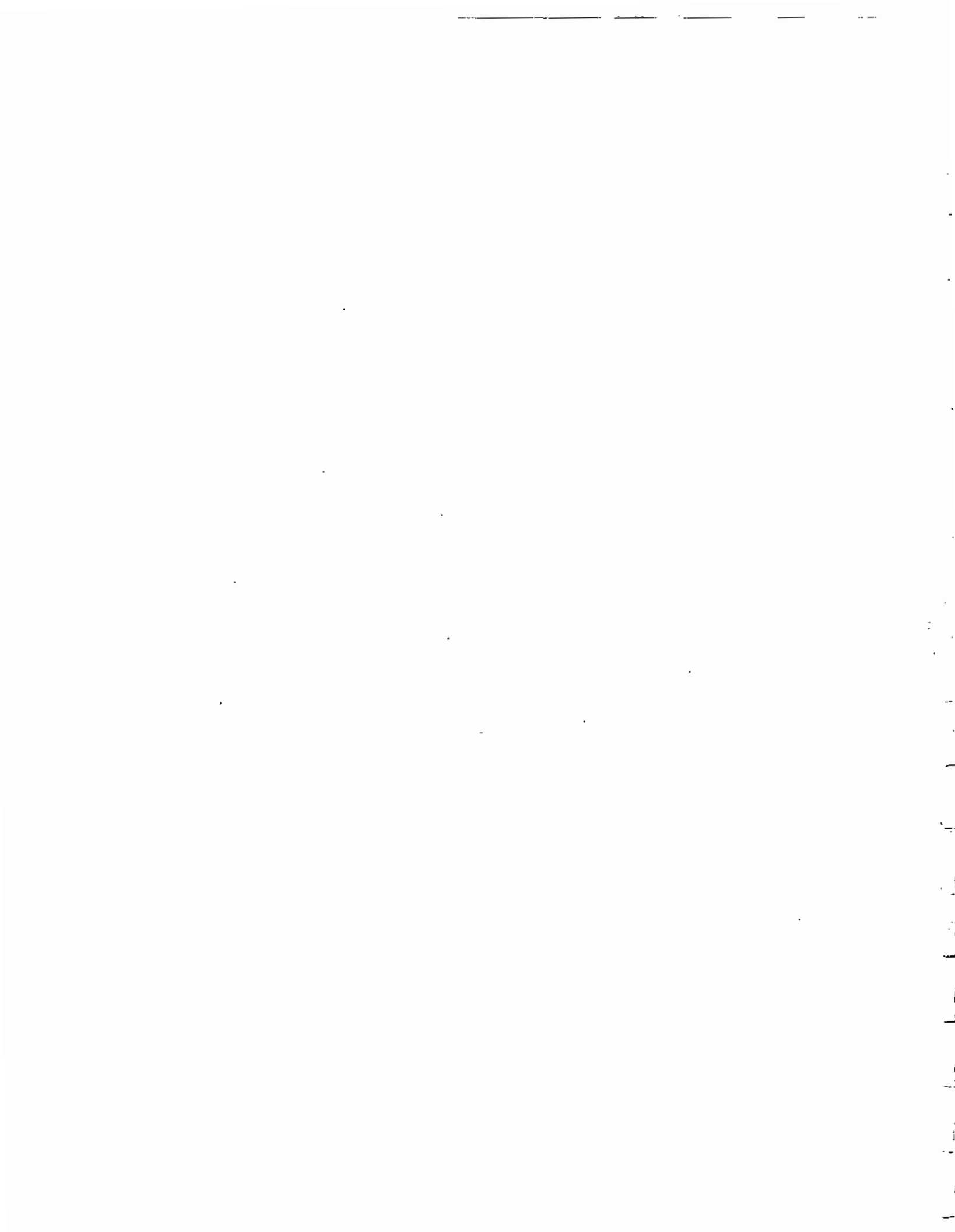
CHAPTER 3

FOOTNOTES

1. N.Y. Exec. Law §§ 800, et seq. (McKinney Supp. 1978).
2. Id. § 801.
3. Ibid.
4. Id. § 803.
5. Legislative Commission on Expenditure Review, Adirondack Park Planning and Regulation 2 (1978).
6. N.Y. Exec. Law § 804(5) (McKinney Supp. 1978).
7. Id. § 816.
8. Id. § 805.
9. Id. § 807.
10. Id. § 809(1).
11. Town of Black Brook v. State of New York, 41 N.Y.2d 486, 393 N.Y.S.2d 946, 362 N.E.2d 579 (1977); Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 393 N.Y.S.2d 949, 362 N.E.2d 581 (1977) (The Act does not violate the home rule provisions of the state constitution); Adirondack Park Agency v. Ton-Da-Lay Associates, 401 N.Y.S.2d 903 (S. Ct., App. Div. 3d Dept. 1978) (the Act does not improperly delegate legislative functions to the executive).
12. Adirondack Park State Land Master Plan, June 1, 1972.
13. N.Y. Exec. Law § 805(3)(C) (McKinney Supp. 1978).
14. Id. § 805(3)(D, E).
15. Id. § 805(3)(F, G).
16. Id. § 805(3)(H).
17. Id. § 806(1).
18. Id. § 806.
19. Id. § 807(1).

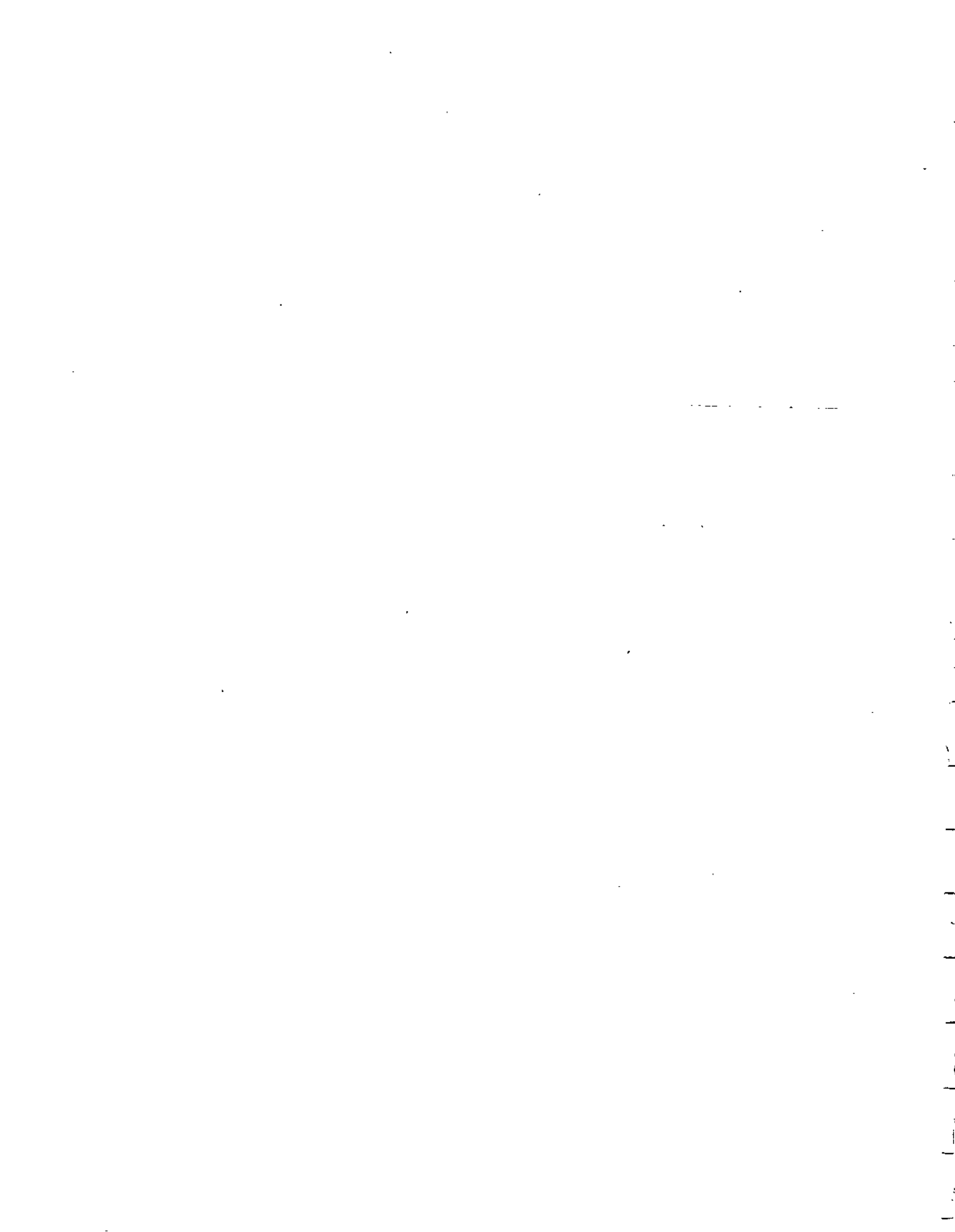
20. Ibid.
21. Id. § 807(2).
22. Id. § 807(5).
23. Id. § 807(3).
24. Id. § 807(6).
25. Id. § 809(1).
26. Id. § 810.
27. Id. § 810(1)(a).
28. Id. § 810(1)(e).
29. Id. § 810(2)(d).
30. Id. § 809(2).
31. Id. § 809(3)(d).
32. Id. § 809(9).
33. Id. § 809(10).
34. Id. § 809(13).
35. Id. § 803-a(1, 2).
36. Id. § 803-a(7).
37. Id. § 809(2)(a).
38. Id. § 807(5).
39. Id. § 807(1).
40. Id. § 809(1).
41. F. Sullivan, Adirondack Zoning: A National Experiment in Land-Use Control Faces Local Challenge, p. 466, Empire State Report, December, 1975.
42. G. Davis and R. Liroff, Conflict in the North County, Summary of Draft Report 5 (Sept. 1979).

43. Telephone conference with Mr. John Banta, Director of Planning, Adirondack Park Agency, January 15, 1980.
44. Davis and Liroff, pp. 10-11.
45. Id. at 11.
46. Telephone conference with Mr. John Banta, Director of Planning, Adirondack Park Agency, January 15, 1980.
47. Ibid.
48. R. Straniere, Land Use in New York: An Evaluation of Policy and Performance, 40 Albany L. Rev. 693, 703-704 (1976).
49. Telephone conference with Mr. John Banta, Director of Planning, Adirondack Park Agency, January 15, 1980.



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CHAPTER 6

TAHOE REGIONAL PLANNING AGENCY

I. THE PROGRAM

The vulnerable nature of the environment in the Tahoe Basin has long been recognized. The waters of Lake Tahoe are unusually clear due to its youthful age and the relatively small volume of nutrients draining into it. As transportation to the region improved, the development of second homes and hotels, casinos and other recreational facilities has greatly increased. The increased level of development has jeopardized the Basin's environment and concern over the effect on the environment spawned numerous studies concerned with the need for a system of planning and control of land use as a means of stabilizing the effect of development on the Tahoe Basin. Because the Basin is located partly in California and partly in Nevada, the development of a comprehensive land use plan required cooperation of both states and the federal government.

In 1967 and 1968, the California and Nevada legislatures adopted a bi-state compact calling for the creation of an interstate agency to regulate development of the Tahoe Basin. This compact was ratified by the United States Congress in 1969.<sup>1/</sup> The compact created the Tahoe Regional Planning Agency and directed that the Agency develop a comprehensive land use plan for the Tahoe

Basin.<sup>2/</sup> This regional plan was to include a land use plan, a transportation plan, a conservation plan, a recreation plan and a public services and facilities plan.<sup>3/</sup> The Agency was also empowered to adopt all ordinances, rules, regulations and policies necessary to effectuate this regional plan.<sup>4/</sup>

## II. THE TAHOE REGIONAL PLANNING AGENCY

Primary responsibility for implementing the policies of the compact lies in the Tahoe Regional Planning Agency. The Agency is comprised of ten members. Six members of the Agency represent the local governments located in the Basin -- one each from the three local governments on the California side of the Basin and one each from the three local governments on the Nevada side of the Basin. State interests are represented by the remaining four members, the administrator of the California Resources Agency, the director of the Nevada Department of Conservation and Natural Resources, an at-large member appointed by the governor of California and an at-large member appointed by the governor of Nevada. The members appointed by the governors of the two states cannot be residents of the Basin. The member appointed by the governor of California is subject to senate confirmation.<sup>5/</sup>

Members of the Agency serve at the pleasure of the appointing authority, but each appointment must be reviewed at least every four years.<sup>6/</sup>

The Agency is authorized to employ any staff deemed necessary to carry out its functions under the compact.<sup>7/</sup> Funds to cover the Agency's expenses are obtained from the counties within the region (up to \$150,000 apportioned on the same ratio as the full-cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region), the fees collected for services rendered by the Agency and gifts, donations, grants and other financial aids and funds.<sup>8/</sup>

The Agency is responsible for overseeing development of the entire Tahoe Basin. With respect to the land within the Basin, the Agency is directed to adopt a comprehensive plan regulating development in the area. The Agency also is authorized to enact any ordinances necessary to carry out the policies set out in the regional plan. Pursuant to these ordinances, the Agency is empowered to review certain development proposals prior to initiation of the development.<sup>9/</sup>

The regional plan was to include five separate elements. First, the Agency was to develop a land use plan for the

integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.<sup>10/</sup>

Second, the Agency was to develop a transportation plan for the integrated development of a regional system of transportation.<sup>11/</sup>

Third, the Agency was to develop a conservation plan governing the preservation, development, utilization and management of the scenic and other natural resources within the Basin.<sup>12/</sup>

Fourth, the Agency was to adopt a recreation plan for the development utilization and management of recreational resources of the region.<sup>13/</sup>

Finally, the Agency was to adopt a public service facilities plan governing the general location, scale and provision of public services in the Basin.<sup>14/</sup> A complete regional plan was proposed by the Agency in May, 1971 and appropriate ordinances for the enforcement of this regional plan were adopted in the subsequent months.

One of the ordinances adopted by the Agency is the Tahoe Regional Planning Agency Land Use Ordinance. This ordinance is a comprehensive zoning plan for the entire Basin establishing land use districts, allowable uses, density controls, land coverage limitations and other regulations relating to the development of land in the Basin. While

this ordinance is a comprehensive zoning plan, it is administered by local governments in the Basin and local governments are authorized to enact and enforce more restrictive ordinances within their jurisdictions.<sup>15/</sup>

This ordinance requires any person to obtain a permit from the local permit issuing authority with jurisdiction over the land to be developed before initiating any development that will involve the creation of a land coverage of an area greater than 200 square feet or will require an administrative permit or variance permit to be issued.<sup>16/</sup> A permit for the development may be granted by the local authority only if the proposed development complies with all applicable requirements in the land use ordinance.

An administrative permit procedure is provided to allow special consideration of whether a particular use or structure, not specifically permitted under the ordinance, should be allowed.<sup>17/</sup> Administrative permits are required before initiating any commercial development of more than three acres, commercial parking lots, educational facilities and other similar large developments.<sup>18/</sup> An administrative permit can be granted only if the local authority finds that the proposed development is not detrimental to the general welfare of people residing in the area and will not cause any substantial harmful environmental consequences.<sup>19/</sup>

Variance permits may be issued where special circumstances applicable to a particular piece of property prevent reasonable use of the property if the ordinance is strictly applied. The variance permitted should be the minimum from existing regulations necessary to avoid unreasonable deprivation of use of the property and must not create significant possibilities of substantial harmful environmental consequences.<sup>20/</sup>

The Agency need not review permits granted by local authorities solely because the proposed development will create land coverage in excess of 200 square feet. However, all administrative permits and variance permits issued by local authorities must be reviewed by the Agency.<sup>21/</sup> In reviewing these permits, the Agency is to consider the same criteria as the local authority. The Agency is authorized to approve, reject or modify these permits but must take such action within 60 days after the permit is delivered to it or the permit is deemed approved.<sup>22/</sup>

### III. OTHER AGENCIES INVOLVED IN THE PROGRAM

The permits granted pursuant to the ordinances adopted by the Agency are not in substitution for any other permits required by local or state agencies. Therefore, developers will be required to obtain any permits which may

be necessary from other state agencies in both Nevada or California before initiating development. These other state agencies, however, play no role in the administration of the Tahoe regional plan.

The compact does require that the Agency appoint an Advisory Planning Commission to assist it in adopting and amending the Tahoe regional plan. The Planning Commission is to consist of an equal number of members from each state and must include at least the chief planning officers of Placer County, Eldorado County and the City of South Lake Tahoe in California, and the counties of Douglas, Ormsby and Washoe in Nevada, the Placer County director of sanitation, the Eldorado County director of sanitation, the county health officer of Douglas County, the county health officer of Washoe County, the chief of the Bureau of Environment Health of the Health Division of the Department of Health, Welfare and Rehabilitation of the State of Nevada, the executive officer of the Lahontan Regional Water Quality Control Board, the executive officer of the Tahoe Regional Planning Agency and at least four lay members, each of whom shall be a resident of the region.<sup>23/</sup> The Planning Commission was to hold public hearings prior to the adoption of the Tahoe regional plan and, after considering all testimony and written recommendations, was to recommend



a plan to the Agency. The Planning Commission plays the same role with respect to any proposed amendments to the Tahoe regional plan or implementing ordinances.<sup>24/</sup>

#### IV. LOCAL GOVERNMENT PARTICIPATION

The compact and related ordinances do not wholly supplant local land management authorities. The responsibility for the initial administration and enforcement of the Tahoe regional plan and implementing ordinances lies with local authorities. Most important is the responsibility of local governing bodies to administer and enforce the Tahoe Regional Planning Agency Land Use Ordinance. The ordinance provides that no person shall undertake any construction or use involving the creation of land coverage on an area greater than 200 square feet or any construction or use for which an administrative permit or variance permit must be issued before obtaining a permit from the local permit issuing authority with jurisdiction over the land involved.<sup>25/</sup> Pursuant to this provision, local land management authorities retain the responsibility for enforcing the Agency-adopted land use plan. In addition, the Agency plan does not take the place of other permits which may be required by local ordinances. To the extent that these permit requirements are more restrictive than

those found in the Agency's ordinance, they are enforced by local governments. Local decisions with respect to administrative or variance permits, however, are subject to Agency review and may be rejected or modified by the Agency.<sup>26/</sup>

V. SUCCESSSES AND FAILURES OF THE PROGRAM

The program has been implemented by the Agency and local governments in the region as intended by the basic legislation. The success of the program, however, has been hampered by two significant weaknesses of the compact which were the result of the differing interests of the various groups within the Basin. Because of the importance of the gaming industry to Nevada, the compact contains a grandfather clause which requires the Agency to recognize gaming as a conforming use in any area zoned by local governments to allow such use in February, 1968. This requirement applies not only to established casinos but also to new casinos which may be constructed in these areas.<sup>27/</sup> The construction of new casinos in the areas previously zoned for such uses places a heavy burden on the environment of the entire Tahoe Basin. In addition to the problems created by the casinos themselves, each new casino results in increasing pressure on the Agency and local

permitting authorities to allow the development of necessary support facilities such as hotels and residences.<sup>28/</sup>

The second major weakness in the compact was the establishment of the dual majority voting procedure for the Agency. Under this procedure, no action may be taken by the Agency unless a majority of each state delegation agrees to that action. This procedure is particularly significant in light of the fact that, if no action is taken by the Agency within 60 days, all permits to be reviewed by the Agency are deemed approved. This procedure had resulted in the de facto approval of five non-gaming projects and six gaming projects through the middle of 1977.<sup>29/</sup>

A spokesman for the Agency stated, however, that, while everybody recognizes that the regional planning scheme implemented pursuant to the compact is deficient in many areas, the Agency's zoning ordinance has provided significant benefits to the Tahoe Basin. Much of the land within the Basin has been zoned for forest use only and these zoning classifications have withstood challenge by landowners. As a result, a large amount of development which had been planned for these areas before adoption of the compact did not go forward. Thus, while the Agency has not been able to limit development to the extent that it would have liked, it has significantly reduced the level of development within the Basin.<sup>30/</sup>

Another criticism of the Agency has been that, even when it acts on permit applications, the permits generally are approved. Through 1977, the Agency approved 96% of the units submitted to it for approval, including major subdivisions, hotel and casino expansions.<sup>31/</sup> Ten percent of the projects approved by the Agency have necessitated grants of variances.<sup>32/</sup>

An Agency spokesman, however, noted that many permits include strict conditions imposed in an effort to limit the environmental impact of the development. While the Agency admittedly cannot impose conditions when a permit is issued by reason of the inability of the two state delegations to agree as to a course of action, local governments are taking an increasing interest in regulating development and, often, impose very strict conditions on the local level.<sup>33/</sup>

Regardless of the relative successes and failures of the Agency in the years since its inception, the Agency is presently on the verge of collapse. Because the Agency can assess local governments only up to a total of \$150,000.00 to fund its operations, it has been dependent on the voluntary support of the two state governments. State funding was readily available in the Agency's early years; however, California has been reluctant to provide funding because

of the belief that the Agency is "too soft" on development. As a result, California has provided very little funding in recent years and its delegation has essentially withdrawn from the Agency in favor of unilateral efforts to preserve the Basin by the California Tahoe Regional Planning Agency.<sup>34/</sup>

Numerous attempts have been made in the Nevada and California state legislatures to amend the compact in order to remedy some of the problems that have come to light during the first ten years of the Agency's existence. Because of the strong local interest in the continuing development of the area, these amendments have not been passed. The legislatures have shown increasing willingness to compromise on the issues most important in sufficiently strengthening the Agency, however, and Agency supporters believe that there is some chance that the Nevada legislature will, during its next session, be willing to strengthen the Agency sufficiently to allow it to survive.<sup>35/</sup>

CHAPTER 6

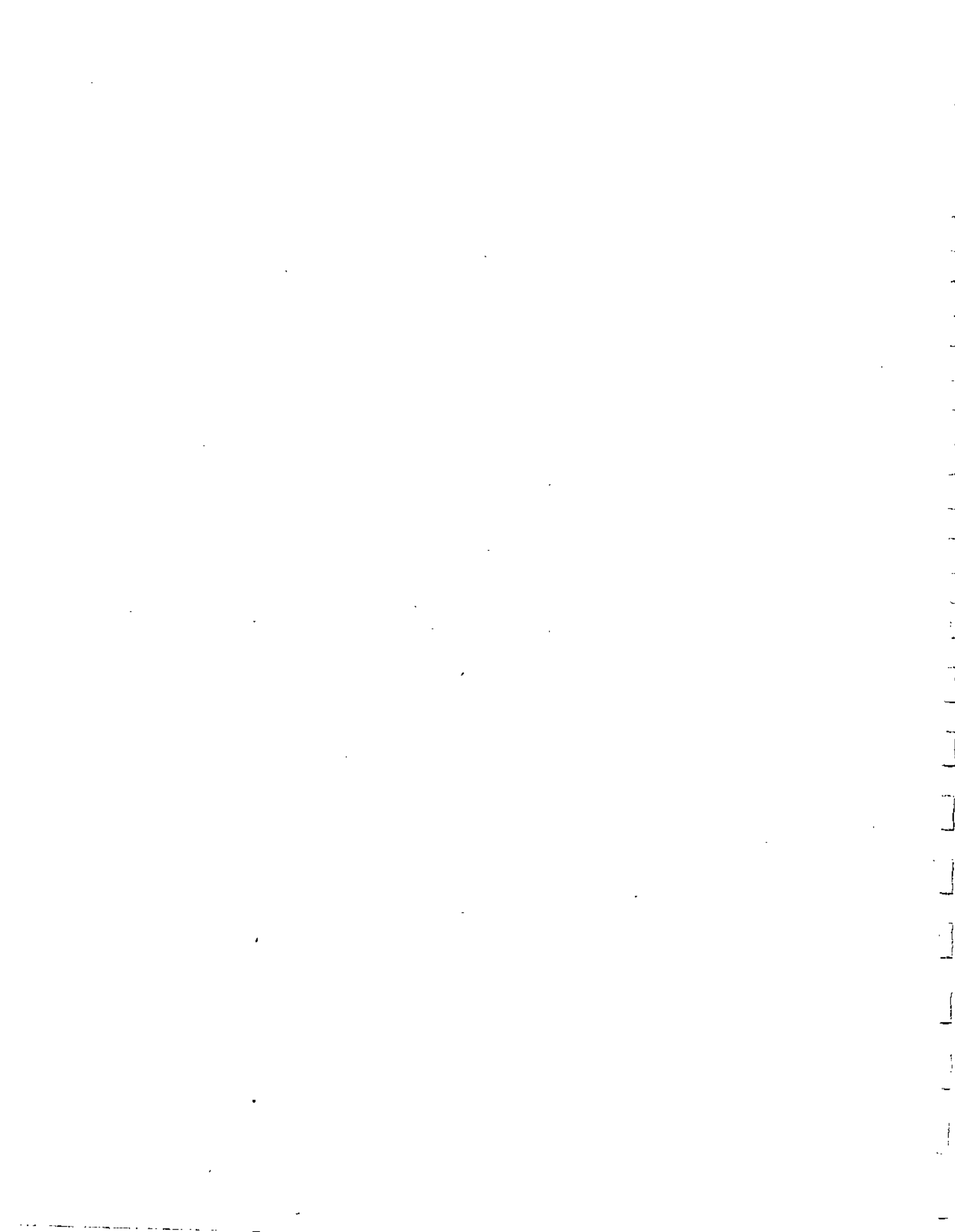
FOOTNOTES

- 1 P.L. 91-148, 83 Stat. 360 (Dec. 16, 1969).
- 2 P.L. 91-148, Art. III, V(b).
- 3 Id. Art. V(b).
- 4 Id. Art. VI(a).
- 5 Id. Art. III(a).
- 6 Id. Art. III(c).
- 7 Id. Art. IV(a).
- 8 Id. Art. VII.
- 9 Id. Art. V(b). Tahoe Regional Planning Land Use Ordinance § 4.30.
- 10 P. L. 91-148, Art. V(b)(1).
- 11 Id. Art. V(b)(2).
- 12 Id. Art. V(b)(3).
- 13 Id. Art. V(b)(4).
- 14 Id. Art. V(b)(5).
- 15 Tahoe Regional Planning Agency Land Use Ordinance § 2.11.
- 16 Id. § 4.10.
- 17 Id. § 3.00.
- 18 Id. § 7.12.
- 19 Id. § 8.33.
- 20 Id. § 8.34.
- 21 Id. § 4.31, .32.

- 22 Id. § 4.32.
- 23 P. L. 91-148, Art. III(h).
- 24 Id. Art. V(a).
- 25 Tahoe Regional Planning Agency Land Use Ordinance § 4.10.
- 26 Id. § 4.32.
- 27 California Dept. of Finance, Regional Planning at Lake  
Tahoe -- An Analysis, p. 8 (July, 1977) [hereinafter  
cited as "Regional Planning -- An Analysis"].
- 28 Id. at 9-10.
- 29 Id. at 8.
- 30 Telephone conference with Mr. Gary Owen, counsel to  
Tahoe Regional Planning Agency, January 21, 1980.
- 31 "The Tahoe Troubles," W. Anderson. Cry California  
(Summer, 1978).
- 32 Regional Planning -- An Analysis at 31.
- 33 Telephone conference with Mr. Gary Owen, counsel to  
Tahoe Regional Planning Agency, January 21, 1980.
- 34 Ibid.
- 35 Ibid.

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CHAPTER 7

CRITICAL AREA AND DEVELOPMENT  
OF REGIONAL IMPACT PROGRAMS

Although local government has been the predominant agency of the state in controlling land use, some states have come to the recognition that state or regional agencies must play some role in decisions regarding land use having an impact beyond the local jurisdiction so that purely local interests are not permitted to dominate decisions in which a broader constituency has a legitimate concern. The American Law Institute's Model Land Development Code in Article 7 provided a mechanism for identifying "areas of critical state concern" and "development of regional impact" and for bringing the interests of state and regional agencies into play in the process of deciding whether to permit particular types of developments. Two states, Massachusetts and Florida, have taken ideas from the American Law Institute's Code and adopted them for use on those states.

I. THE PROGRAM

A. Martha's Vineyard Commission

Until the late 1960's and early 1970's Martha's Vineyard, a large and beautiful island off the coast of Massachusetts, had escaped the development pressures which were so strong elsewhere along the Atlantic coastline.

By the early 1970's development pressure had grown so considerably that every inch of the island was being eyed by developers. The popularity of Martha's Vineyard as a summer resort with the concomitant pressures for more and more summer homes, hotels, public transportation and other public facilities conflicted sharply with the ecological limitations of the island and the desires of its year-round population. As of 1971 only three of the island's six towns had any zoning, no town had subdivision regulations and only one town had a building code.

In 1972, Senator Edward M. Kennedy proposed a national bill to make the island part of the Cape Cod National Seashore.<sup>1/</sup> Unhappy with the proposed federal legislation, the citizens of Martha's Vineyard, in 1974, by vote of 1,305 to 64, approved proposed state legislation to protect the island.<sup>2/</sup> The resulting statute,<sup>3/</sup> enacted as an emergency law, declared that to prevent irreversible damage to the island and ultimately to its economy, it was necessary to establish the Martha's Vineyard Commission (hereinafter the "Commission"). The purpose of the Commission is:

[T]o further protect the health, safety and general welfare of Island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural,

historical, ecological, scientific and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from developments and uses which would impair them, and by promoting the enhancement of sound local economies. <sup>4/</sup>

In essence, the 1974 and amending legislation of 1977<sup>5/</sup> provides for a regional commission with authority to regulate critical areas and significant developments on the island.

B. The Florida Environmental Land and Water Management Act

The State of Florida adopted a program similar in many respects to the Martha's Vineyard approach on a statewide basis and without the threat of federal legislation. In the late 1960's and early 1970's, Florida experienced an explosive period of growth and development. Large-scale developments involving tens of thousands of acres of land threatened coastal wetlands, the Florida Everglades and other areas and values of environmental significance. In addition, South Florida experienced an extended drought which compounded the impact of development activities.

A majority of local governments exercised no land use regulatory power, and many of those that did were either incapable or unwilling to consider regional and state interests affected by their decisions.<sup>6/</sup> In 1972,

in response to the problem, the Governor of the state assembled a task force on resource management composed of legislators, landowners, environmentalists, developers and public administrators to consider what action, if any, the state should take. The recommendation of the task force was a state role in land use decision-making for developments of greater than local impact and areas of regional or state significance. Their recommendation, as in Massachusetts, was modeled after a draft of Article 7 of the American Law Institute's Model Land Development Code.<sup>7/</sup>

The management theory behind the Florida program<sup>8/</sup> has been described as follows:

(1) Local governments should continue to have total responsibility for those land use decisions which only affect persons within their jurisdictions. . . .

(2) The state role is to represent the broader public interest in those land use decisions which have a substantial regional or statewide impact.

(3) The line between private property rights and governmental regulation through the police power is unchanged. The same constitutional standards which operate when a local government regulated private land will apply to state action.<sup>9/</sup>

The Florida statute employs an extremely inclusive definition of "development" which is regulated by the Act.

(1) "Development" means the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land and the dividing of land into three or more parcels.

(2) The following activities or uses shall be taken for the purposes of this chapter to involve development, as defined in this section:

(a) A reconstruction, alteration of the size or material change in the external appearance, of a structure on land.

(b) A change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices or dwelling units in a structure or on land.

(c) Alteration of a shore or bank of a seacoast, river, stream, lake, pond, or canal, including any coastal construction as defined in s. 161.021.

(d) Commencement of drilling, except to obtain oil samples, mining, or excavation on a parcel of land.

(e) Demolition of a structure.

(f) Clearing of land as an adjunct of construction.

(g) Deposit of refuse, solid or liquid waste, or fill on a parcel of land.

\* \* \*

(4) "Development," as designated in an ordinance, rule or development permit

includes all other development customarily associated with it unless otherwise specified. When appropriate to the context, development refers to the act of developing or to the result of development. Reference to any specific operation is not intended to mean that the operation or activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of subsection (1). 10/

This definition made a number of activities which had previously been unregulated (for example, clearing and grading), subject to the land use decision-making process. However, there were a number of statutory exceptions, one of which, "agricultural activities," represents a significant loophole for avoiding regulation under the program.

## II. THE MARTHA'S VINEYARD COMMISSION

The Commission consists of twenty-one members comprised of one selectman or a resident registered to vote from each town 11/ on Martha's Vineyard appointed by the Board of Selectmen, nine persons elected at large, islandwise, 12/ one county commissioner of Dukes County, one member of the cabinet appointed by the Governor, or his designee, and four persons appointed by the Governor as non-voting members whose principal residences are not on Martha's Vineyard. 13/

The Commission governs all land and water within

Dukes County with the exception of specific areas of the town of Gay Head. To the extent they are excluded from the jurisdiction of the towns, all state lands within Dukes County are specifically included within the Commission's jurisdiction.<sup>14/</sup>

The powers of the Commission are largely modeled after Article 7 of the American Law Institute's Model Land Development Code.<sup>15/</sup> The Commission is required to formulate standards to determine (a) whether a proposed area on the island is of critical planning concern, and (b) whether a proposed development is a development of regional impact.

A. Districts of Critical Planning Concern

To be designated by the Commission as an area of critical planning concern (CPC) a district must qualify in any case as possessing unique resources (natural, historical, ecological, scientific, or cultural) of regional or statewide significance; or as having marginal soil or topographic conditions rendering it unsuitable for intense development; or as being significantly affected by, or having significant impact on, an existing or proposed "major public facility" or other area of major public investment.<sup>16/</sup> A "major public facility" is defined to include any public facility operated by a town primarily for the benefit of the residents of that town, any street or



highway not maintained as part of the State or Federal highway system, or any educational institution serving primarily the residents of one town.<sup>17/</sup>

A procedure is described for the nomination of areas for designation as a CPC district.<sup>18/</sup> Subject to certain emergency exceptions, the Commission's acceptance of a nomination for consideration suspends a town's power to grant development permits applicable within the proposed district.<sup>19/</sup> The Commission is required to explain its actions with regard to nominations.<sup>20/</sup> If it decides to designate a CPC district, it must accompany the designation with a specification of guidelines for the development of the district, based on considerations such as possible water, air, land or noise pollution, burdening of water supply, beach erosion or damage to the littoral ecology or wetlands.<sup>21/</sup>

Upon designation of a CPC district, each town whose boundaries include any part of the district may, subject to approval or amendment by the Commission, adopt regulations conforming to the applicable guidelines, having for the purpose all the powers it otherwise had under the General Laws. If a town fails to propose regulations, the Commission on notice and hearing formulates them for the town.<sup>22/</sup> These regulations, as well as developments of regional impact, may include any type

of regulation which may be adopted by any city or town under the General Laws;<sup>23/</sup> and they may differ from the otherwise relevant local development ordinances and by-laws in their scope and magnitude when the latter are clearly restrictive of the Commission's purposes.<sup>24/</sup> Whether or not the regulations for a CPC district were proposed by a town, they are incorporated into the town's ordinances and by-laws and are in the first instance to be administered by the town as if they were part of its development ordinances and by-laws.<sup>25/</sup>

B. Developments of Regional Impact

The Commission is also required to promulgate standards and criteria specifying the types of development which constitute developments of regional impact (DRI's).<sup>26/</sup> A DRI is a development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present development issues significant to more than one town.<sup>27/</sup> In designing standards for a DRI, the Commission must consider the following issues: environmental problems; size of site; traffic generation; residential and employment impact; regional markets; proximity to waterways; public lands or municipal boundaries; and the need for regional services.<sup>28/</sup>

When a permit for a development is sought from

town authorities, they determine initially whether, according to the standards and criteria of the Commission, the proposed development is a DRI. If it is, the application for the permit is referred to the Commission.<sup>29/</sup> The Commission reviews all applications referred by local agencies and permits the local agency to grant a development permit only if, after notice and public hearing, the development is found to be consistent with local development ordinances, including regulations of any relevant CPC district, and with the local and regional plans for development.<sup>30/</sup> A proposed DRI may be approved by the Commission only if the probable benefit from the proposed development will exceed the probable detriment as determined by the Commission after analyzing both local and regional benefits and detriments.<sup>31/</sup> The Commission's consideration is not limited to the situation of the town that referred the development proposal, but extends to the impact on areas within other towns, as well as to examination of available alternative locations in the island.<sup>32/</sup> In its role as a regional authority the Commission may approve a development which is inconsistent with a local development ordinance if the development is essential to further Martha's Vineyard's housing, education or recreational needs.<sup>33/</sup> No referring municipal agency may grant a development permit for a DRI except

with the permission of the Commission.<sup>34/</sup> The Commission may also specify conditions to be met by the developer of the permitted DRI for the purpose of minimizing economic, social or environmental damage.<sup>35/</sup>

C. Other State Agencies Involved in the Program

The executive office of environmental affairs is the only state agency specifically involved in the Martha's Vineyard program. The standards and criteria adopted by the Commission to determine a CPC and to review DRI's must be submitted to the secretary of the executive office of environmental affairs for approval.<sup>36/</sup> The secretary, with the concurrence of such other members of the Governor's cabinet as the Governor designates for this purpose, may approve, disapprove or amend and approve, with the advice and consent of the Commission, the standards and criteria submitted by the Commission.<sup>37/</sup>

Although other state agencies are not specifically addressed in the Act, their land holdings on the island are within the jurisdiction of the Commission.<sup>38/</sup>

III. IMPLEMENTATION IN FLORIDA

Florida did not create a new agency as did Massachusetts to implement its program. Rather, final state level decision-making responsibility to permit development in critical areas or of regional impact was

lodged in the Governor and cabinet sitting as the Administration Commission or the Florida Land and Water Adjudicatory Commission, depending on the action being taken. However, the State Land Planning Agency is given the responsibility of developing recommendations to the Governor and cabinet and handling much of the day-to-day administration of the program.

A. Areas of Critical State Concern

Under the original version of the Florida statute, areas of critical state concern were to be designated by Florida's Governor and cabinet sitting as the Administrative Commission after a recommendation by the State Land Planning Agency. A host of entities are authorized to propose areas for designation, and the State Land Planning Agency is required to prepare an assessment of each proposal together with a series of principles which should be implemented to guide development in the proposed area.<sup>39/</sup>

The criteria under the original statute for designation of critical areas were very general:

- (1) An area containing, or having a significant impact upon, environmental, historical, natural or archaeological resources of regional or statewide importance.
- (2) An area significantly affected by, or having a significant effect upon, an existing or proposed major public

facility or other major public investment.

(3) A proposed area of major development, which may include a proposed site of a new community, designated in a state land development plan. 40/

In response to the designation of two areas of critical state concern by the Administration Commission, the environmentally sensitive Florida Keys and the Green Swamp, landowners challenged the Act alleging that the designation process was impermissibly vague as to areas that could be designated, thereby unconstitutionally delegating legislative authority to the Administration Commission. Ultimately, the Supreme Court of Florida agreed. 41/ In response, the Legislature designated both areas as critical areas, modified the Act and elaborated on the criteria for areas which can be designated. In addition, annual legislative review of critical area designation was established. 42/

Under the modified legislation, an area of critical state concern may be designated only for:

1. An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance, including but not limited to state or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, outstanding Florida Waters, and aquifer recharge areas, the uncontrolled private or public

development of which would cause substantial deterioration of such resources. Specific criteria which shall be considered in designating an area under this paragraph include:

- a. Whether the economic value of the area, as determined by the type, variety, distribution, relative scarcity and condition of the environmental or natural resources within the area, is of substantial regional or statewide importance.
- b. Whether the ecological value of the area, as determined by the physical and biological components of the environmental system, is of substantial regional or statewide importance.
- c. Whether the area is a designated critical habitat of any state or federally designated threatened or endangered plant or animal species.
- d. Whether the area is inherently susceptible to substantial development due to its geographic location or natural aesthetics.
- e. Whether any existing or planned substantial development within the area will directly, significantly, and deleteriously affect any or all of the environmental or natural resources of the area which are of regional or statewide importance.

2. An area containing, or having significant impact upon, historical or archaeological resources, sites, or statutorily-defined historical or archaeological districts, the private or public development of which would cause substantial deterioration or complete loss of such resources, sites or districts. Specific criteria which shall be considered in designating an area under this paragraph include:

a. Whether the area is associated with events that have made a significant contribution to the history of the state or region.

b. Whether the area is associated with the lives of persons who are significant to the history of the state or region.

c. Whether the area contains any structure which embodies the distinctive characteristics of a type, period, or method of construction or that represents the work of a master, or that possesses high artistic values, or that represents a significant and distinguishable entity whose components may lack individual distinction and which are of regional or statewide importance.

d. Whether the area has yielded, or will likely yield information important to the prehistory or history of the state or region.

3. An area having a significant impact upon, or being significantly impacted by, an existing or proposed major public facility or other area of major public investment including, but not limited to, highways, ports, airports, energy facilities and water management projects. 43/

As in the Martha's Vineyard program, local governments have the opportunity to submit existing or modified local regulations to the State Land Planning Agency for review and approval. Proposed developments in critical areas are first reviewed by local governments pursuant to their approved regulations or regulations imposed by the Administration Commission and all



development orders issued are forwarded to the State Land Planning Agency and are not final for 45 days. Enforcement of the regulations in an area of critical state concern is ensured by the State Land Planning Agency's standing to appeal individual local decisions to the Florida Land and Water Adjudicatory Commission.<sup>44/</sup>

B. Developments of Regional Impact

The Florida DRI process is designed to cover developments having an impact on citizens of more than one county.<sup>45/</sup> Administrative regulations have defined various kinds and sizes of developments presumed to have regional impact. Among the developments are such things as airports; sports, entertainment or recreational facilities providing for certain numbers of spectators or parking spaces; facilities for conducting pari-mutual wagering; 100 or more megawatt electrical generating facilities; 230 or more kilovolt electric transmission lines; hospitals serving more than one county or having a capacity of more than 600 beds; industrial, manufacturing or processing plants or industrial parks occupying more than one square mile or providing parking for more than 1,500 cars; office parks occupying more than 30 acres, encompassing more than 300,000 square feet of gross floor area; certain petroleum storage facilities; water ports; residential developments over certain sizes; colleges

designed for more than 3,000 students; and retail or wholesale businesses occupying more than forty acres, encompassing more than 400,000 square feet of floor area or providing parking for more than 2,500 cars.<sup>46/</sup>

When an application for development approval for a development of regional impact is completed, the appropriate local government holds a public hearing in the same fashion as for a rezoning. The appropriate regional planning agency is required to prepare a report and recommendation on the regional impact of the proposed development. The statute enumerates the subjects to be considered in the regional planning agency's report:

In preparing its report and recommendations, the regional planning agency shall consider whether, and the extent to which:

1. The development will have a favorable or unfavorable impact on the environmental and natural resources of the region.
2. The development will have a favorable or unfavorable impact on the economy of the region.
3. The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities.
4. The development will efficiently use or unduly burden public transportation facilities.
5. The development will favorably or adversely affect the ability of people

to find adequate housing reasonably accessible to their places of employment.

6. The development complies with such other criteria for determining regional impact as the regional planning agency shall deem appropriate, including but not limited to, the extent to which the development would create an additional demand for, or additional use of energy. . . . 47/

After the regional planning agency report and recommendations are prepared, the local government holds the required public hearing and decides whether to grant, grant with conditions, or deny the application for development approval. Under Section 380.06(11) of the Florida Statutes, the local government is required to consider whether, and the extent to which:

1. The development unreasonably interferes with the achievement of the objectives of an adopted state land development plan applicable to the area;
2. The development is consistent with the local land development regulations; and
3. The development is consistent with the report and recommendations of the regional planning agency submitted pursuant to subsection (8) of this Section.

The decision of the local government can then be appealed to the Florida Land and Water Adjudicatory Commission by the developer, the pertinent regional planning agency and the State Land Planning Agency. The Act

encourages such appeals to be "on the record." However, the practice has been to entertain de novo hearings on the merits of the application for development approval.

#### IV. LOCAL GOVERNMENT PARTICIPATION

The roles of local governments in each of the Martha's Vineyard and Florida programs are substantial. In Florida, local governments can make the initial development permitting decisions pursuant to approved regulations in all instances with the decisions being subject to review by the Florida Land and Water Adjudicatory Commission.

In Martha's Vineyard, local governments retain permitting control for development which is not within a CPC area and which does not constitute a DRI. In the case of DRI's each local permitting agency initially determines, based on Commission guidelines, whether the application is for a DRI and therefore whether it must be forwarded to the Commission for approval.<sup>48/</sup> If the application is not for a DRI, local ordinances govern development approvals.

After the designation of CPC districts by the Commission, a local government whose boundaries include all or part of the district may adopt regulations in conformance to the guidelines for the development of the

district as set forth in the designation.<sup>49/</sup> Such local regulations are to be submitted to the Commission and approved if they conform to the Commission guidelines for the district.<sup>50/</sup> If the municipality fails to submit regulations or if the regulations submitted are not approved within specified time limits, the Commission is then responsible for preparing the regulations for the municipality.<sup>51/</sup> However, the statute limits the extent to which regulations adopted by the Commission for use by the town may supersede local ordinances otherwise applicable to the proposed development. Only where Commission finds that the public health, safety and welfare would be endangered or that irreversible damage would result to natural, historical, ecological, scientific, or cultural values on the island by the continuing application of the existing local development restrictions may Commission regulations prevail.<sup>52/</sup>

Local governments on Martha's Vineyard share the burden of funding the Commission. Pursuant to the Act, the Commission must annually estimate its expenses for the following year and, after deducting any other sources of funds, prorate the net expenses to each town on the basis of its latest equalized valuation for property tax purposes. Each town must then include that amount in the tax levy of the year and pay it to the Commission.<sup>53/</sup>

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or development resource, major public investment and "hazardous."<sup>55/</sup>

For example, the Commission designated one area as an "Island Road District" and another as a "Coastal District." The former takes in all land adjacent to or associated with major roads on the island. The CPC district guidelines provide that, except by special permit, structures within this zone shall not exceed eighteen feet for a pitched roof and thirteen feet for a flat roof.

The "Coastal District" embraces essentially all the coastline of the island, and areas of the major coastal ponds, harbors and tributary streams and wetlands feeding the coastal ponds. Guidelines for a shore zone allow only quite restricted uses. For an island zone, guidelines permit single-family residences but with restrictions aimed particularly at water supply and sanitary disposal facilities and with limitations on the height of structures. There are also guidelines for similar uses in areas associated with streams and wetlands draining into the coastal great ponds.

The Commission has survived an initial judicial challenge but that case did not attack the constitutionality of the statute. The case held that a grandfather clause in the state zoning enabling act which protected a developer for seven years after approval of a subdivision

plat did not control the Commission's actions because such actions were not local zoning decisions. <sup>56/</sup>

The following dicta appear in the opinion:

. . . not only is chapter 637 a statute of the General Court; the reason of its being is to import regional--island-wide and state-wide--considerations into the protection of the land and water of Martha's Vineyard considerations which, the legislature could believe, the towns themselves had not and would not severally bring to bear. . . . It might be thought a perverse anomaly if these regional purposes could be thwarted, as to undeveloped resources requiring CPC or DRI status, by freezing and preserving for seven years pre-existing local by-laws with narrow orientation. <sup>57/</sup>

The analogy is not lost to the supersession of local zoning control over housing by the Anti-Snob Zoning Law upheld in Board of Appeals of Hanover v. Housing Appeals Comm. in the Dept. of Community Affairs. <sup>58/</sup> Yet it should be noted that more recently an effort to invoke the Anti-Snob Zoning Law was frustrated by a local government's move to condemn the property designated for low and moderate income housing. <sup>59/</sup>

The Massachusetts decision appears to leave unanswered the question whether local regulations adopted to conform to regional guidelines of the Commission are zoning regulations and hence limited to those powers



expressly granted by existing enabling legislation or home rule authority. One example would be a guideline that would require the adoption of a transfer of development rights as yet unauthorized by state law.<sup>60/</sup>

It has not all been cakes and ale, however, on Martha's Vineyard. One of the towns, Edgartown, the largest, pulled out by getting a special act through the legislature and one of the other towns has been agitating to get the law amended to restore some of the local authority.

A current lawsuit is also challenging the Commission's power to regulate a steamship authority also created by the Commonwealth. This decision, expected this Spring, will have interesting ramifications, vis-a-vis two agencies, both arms of the State.

#### B. Florida

It is difficult to assess the effectiveness of the critical area or DRI programs in Florida. The only administrative designations of critical areas have been overturned by the courts although the legislature has made some designations. Some local resistance to the critical areas program has led to some suggestions such as "you designated it, you protect it." However, there are contrary opinions suggesting that the threat of critical area designation has led some local governments

to become much more cognizant of their responsibilities and to give greater consideration to broader than local interests. For example, the threat by the State Land Planning Agency to recommend designation of an estuarine preserve in Appalachiocola Bay as a critical area led to a comprehensive water management program in one county.

With respect to the DRI program, opponents of some large-scale developments that have not been approved are understandably enthusiastic about the program. Others, particularly landowners who have been turned down, are equally unenthusiastic. One reason it is so difficult to assess the operational effect of the Act is that the grandfathering clauses in the Act perpetuated many on-going or planned projects precluding a visible change in development patterns. Many of the large-scale projects which generated the concern which led to the adoption of the program were exempted and continued unimpeded.

Another reason it is difficult to assess the programs is the intervening enactment of The Local Government Comprehensive Planning Act of 1975.<sup>61/</sup> The Planning Act is a sweeping mandatory planning act that commands each local government to "get on" with the task of planning. Although many of the plans generated by local governments are extremely poor, the Planning Act has stimulated or coincided with a substantial awakening of local interests

to local and regional land use issues. Therefore, the direct impact of Chapter 380 is masked by the mobilization planning created by the Planning Act.

There are visible, positive results. The technical level of planning activities and related sciences has been substantially elevated. In 1974, fewer than one-half of the local jurisdictions in Florida had any local land use regulation (not even a building code). Today, responsible and innovative decision-making is more the rule rather than the exception. Finally, Chapter 380 has served as a focal point for environmental reorganization, water management and land use regulation which has become sophisticated and highly regarded in Florida.

CHAPTER 7

FOOTNOTES

1. The Nantucket Sound Islands Trust Bill, S.3485, introduced on April 11, 1972.
2. An Act to Protect Land & Water on Martha's Vineyard, submitted to the Senate & House of Representatives of Massachusetts by Governor Sargent in March, 1974 as House Bill No. 5567.
3. Ch. 637 of the Acts of 1974.
4. Ch. 831 of the Acts of 1977, § 1 [hereinafter cited as Ch. 831].
5. Ch. 831.
6. See, generally, Finnell, Saving Paradise: The Florida Environmental Land and Water Management Act of 1972, 1973 Urban Law Annual 103.
7. Tentative Draft No. 3.
8. Ch. 380; Fla. Stat. (1977).
9. Environmental Regulation and Litigation in Florida, Fla. Bar, 1974, at pp. 183-4.
10. Section 380.04 Fla. Stat. (1977).
11. The Commission presently has five member towns. Edgartown voters accepted a state law allowing the town to withdraw from Commission membership.
12. If the Commission adopts regulations for a CPC district for a town because that town has failed to adopt its own regulations, then the Commission shall consist of four additional members who shall vote in adopting regulations for CPC districts within their town.
13. Ch. 831, § 2.
14. Id.
15. American Law Institute, A Model Land Development Code, Art. 7 (1976).
16. Ch. 831, § 8.

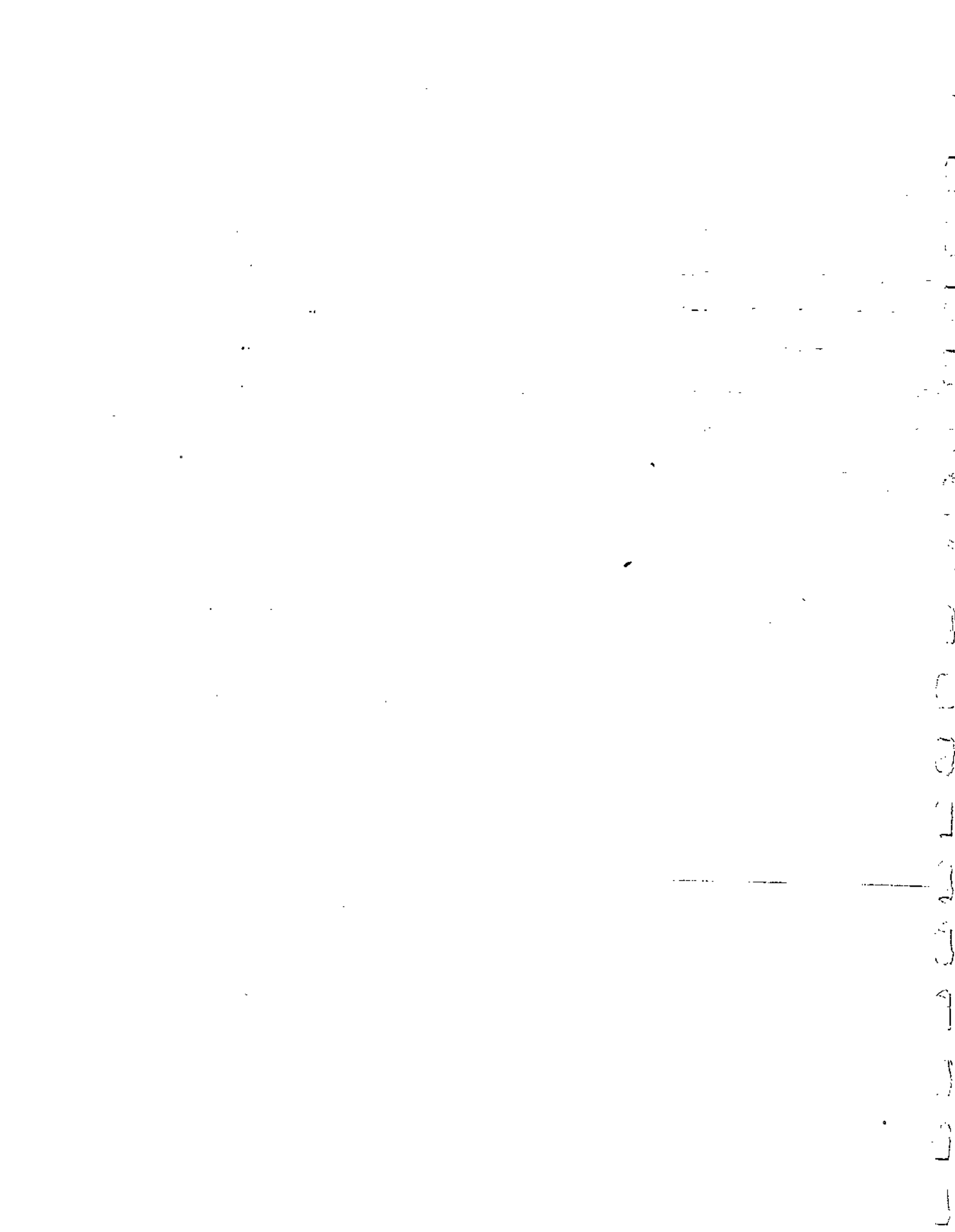
17. Id.
18. Id.
19. Id. § 9.
20. Id. § 8.
21. Id.
22. Id. § 10.
23. Id.
24. Id. § 3.
25. Id. § 10.
26. Id. § 12.
27. Id.
28. Id.
29. Id. § 13.
30. Id. § 14.
31. Id. § 14(a).
32. Id. § 15.
33. Id. § 14(c).
34. Id. § 16.
35. Id.
36. Id. § 7.
37. Id.
38. Id. § 2.
39. In addition to the administrative designation provided for in the Act, the Legislature of the State of Florida has acted independently to designate areas such as the Big Cypress Area. Section 380.055 Fla. Stat. (1977).

40. Section 380.05(2) Fla. Stat. (1977).
41. Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1978).
42. Ch. 79-13 Laws of Florida (1979).
43. Id.
44. Section 380.07 Fla. Stat. (1977).
45. Section 380.06(1) Fla. Stat. (1977).
46. Chapter 22F-2, Fla. Administrative Code.
47. Section 380.06(8)(a) Fla. Stat. (1977).
48. Ch. 831, § 13.
49. Id. § 10.
50. Id.
51. Id.
52. Id. § 3.
53. Id. § 4.
54. The Martha's Vineyard Commission Regulations, 1975.
55. Id.
56. Island Properties, Inc. v. Martha's Vineyard Commission, 361 N.E.2d 385 (Mass. 1977).
57. Id. at 392.
58. 294 N.E.2d 393 (1973).
59. Town of Chelmsford v. DiBiase, 345 N.E.2d 373 (Mass. 1976).
60. It is of interest to note that the Commission studied TDR's and concluded that "the tool has more liabilities associated with it than benefits."
61. Sections 163.3161 et seq. Fla. Stat. (1977).

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CHAPTER 8

WISCONSIN SHORELAND AND FLOODPLAIN PROTECTION PROGRAM

I. THE PROGRAM

Wisconsin is noted for the water-oriented recreation associated with its many ponds, lakes, streams and rivers. The construction of acceptable roads into northern Wisconsin in the 1920s and 1930s led to increasing development of the state's recreational waters. This increasing development led to misuse and overuse of septic tank waste disposal systems and caused substantial water pollution problems. Improper construction and development on low-lying land resulted in pollution of wells and surface waters. Grading and filling during construction of buildings and roads caused erosion and siltation.

A commission was formed as early as 1929 to coordinate a statewide anti-pollution program for water resources in an effort to preserve the scenic beauty of the lakes and rivers and their value as wildlife reserves. This approach was only marginally successful, however, and, over the years, pressures increased for a stronger state water management program.

These pressures culminated in the passage of the Wisconsin Water Resources Act of 1966. The Act treats shorelands as a special management unit to minimize water pollution and to preserve the wildlife and natural beauty

which make the waters and shorelands recreationally attractive. The Act requires all counties to enact regulations for the protection of all shorelands in unincorporated areas in order to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of natural structure and land uses and reserve shore cover and natural beauty."<sup>1/</sup> If the counties fail to adopt effective shoreland protection regulations, the state Department of Natural Resources is authorized to impose such regulations.

In addition to requiring county shoreland zoning ordinances, the Water Resources Act provides for the enactment of floodplain zoning ordinances by all counties, cities and villages in the state. Again, the Department of Natural Resources is authorized to impose such regulations in the event that local authorities fail to take appropriate action.

## II. DEPARTMENT OF NATURAL RESOURCES

The Act does not provide for the creation of a new agency or commission to administer the shoreland and floodplain zoning programs. Rather, an existing executive department, the Division of Environmental Protection of the

Department of Natural Resources, was made responsible for administering the programs. Within the Division of Environmental Protection, the programs are administered by the Floodplain and Shoreland Management Section of the Bureau of Water and Shoreland Management.<sup>3/</sup>

A. Shoreland Zoning Program

Pursuant to the Act, the Department is to prepare "general recommended standards and criteria" to be followed by the counties in developing zoning ordinances regulating shorelands in unincorporated areas within each county. The Department is to give particular attention to:

safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low-lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.<sup>4/</sup>

In accordance with this legislative mandate, the Department has promulgated regulations intended to guide counties in the development of shoreland zoning ordinances. These regulations require (1) the establishment of conservancy, recreational-residential and general purpose districts as

a means of protecting shoreland areas from overdevelopment; (2) the establishment of subdivision regulations prohibiting any subdivision that is likely to result in a hazard to the health, safety and welfare of future residents, fails to maintain proper relation to adjoining areas, unduly restricts public access to navigable waters, does not provide adequate storm drainage facilities, or violates any state law or administrative code provision; (3) the establishment of land use regulations which govern minimum lot sizes, building locations, cutting of trees and shrubs and filling, grading, laguning and dredging of navigable waters; (4) the establishment of sanitary regulations for sewage disposal and water supply systems; and (5) the adoption of administration enforcement regulations providing for an administrator, a permit system, an exception procedure and a board of review.<sup>5/</sup>

The Department has also drafted a Model Shoreland Protection Ordinance based on these standards. The Model Ordinance is essentially a resource-oriented zoning ordinance including use districts, parking and loading provisions, exception procedures and lot size controls.<sup>6/</sup>

The Model Ordinance creates three principal shoreland zoning districts -- conservancy, recreational-residential and general purpose. The conservancy district is designed

primarily to protect shorelands designated as swamps or marshes. These areas are seldom suitable for building and, pursuant to the Model Ordinance, may be used for forestry, transmission lines, hunting, fishing, riding, golf courses and similar uses. Residential, commercial and industrial development is not permitted.<sup>7/</sup>

The residential-recreational classification includes shorelands along specified waterways which are particularly suited for residential and recreational uses. Single-family dwellings and, by special exception, hotels, motels, restaurants and similar uses are permitted in these areas.<sup>8/</sup>

The general purpose districts cover all areas not included in conservancy or residential-recreational districts. These areas are suited to a wide variety of uses and most types of development are allowed in this district.<sup>9/</sup>

The Act provides that if any county does not adopt a shoreland zoning ordinance by January 1, 1968, the Department can adopt such an ordinance regulating shoreland development in that county.<sup>10/</sup> If a county has adopted a shoreland management ordinance, the Department may, after a notice and hearing, make a determination that the ordinance does not meet reasonable minimum standards and, thereafter,

impose an appropriate ordinance on the county.<sup>11/</sup> The Act does not give the Department authority to enforce any shoreland zoning ordinance imposed on a county, however.

B. Floodplain Zoning Program

The purpose of the floodplain zoning statute is to encourage appropriate zoning as a method of protecting human life and avoiding property damage as a result of flooding.<sup>12/</sup> In order to initiate implementation of this program, the Department has promulgated rules designed to provide a uniform basis for the development of floodplain regulations by counties, cities and villages in order to protect life and property, minimize expenditures of public money for flood control projects, minimize business interruptions, minimize damages to public property and discourage the victimization of unwary land and home buyers.<sup>13/</sup>

Local governments are directed to delineate floodway areas and prohibit the erection of structures designed for human habitation in such areas.<sup>14/</sup> Appropriate floodplain ordinances may allow more extensive development on flood fringe areas. However, elevation of such buildings must be regulated so as to minimize flood dangers.<sup>15/</sup>

All counties, cities and villages are required to adopt reasonable and effective floodplain zoning ordinances by January 1, 1968. If no ordinance is adopted by this deadline, or if the Department determines, after a

public hearing, that the ordinance adopted does not meet appropriate standards, the Department is authorized to enact an appropriate ordinance applicable within the county, city or village.<sup>16/</sup> However, after enacting such an ordinance for a county, city or village, the Department has no authority to enforce it; enforcement responsibility remains with the local government.

III. LOCAL GOVERNMENT PARTICIPATION

The Department is responsible for establishing general guidelines to be followed by local governments and is to coordinate the activities of the local governments, but the responsibility for implementing the program lies with each local government. Each county (with respect to shoreland zoning) and each county, city and village (with respect to floodplain zoning) is required to adopt zoning ordinances which are in conformity with the guidelines established by the Department.<sup>17/</sup> In these ordinances, the local governments must establish all necessary procedures for implementing the policies of the Act. So long as local governments adopt appropriate ordinances, the administration of the shoreland and floodplain zoning programs is handled entirely on a local basis by local agencies and pursuant to locally adopted zoning plans and procedures. Even where the Department must impose an ordinance on a local government



which fails to adopt an appropriate ordinance, the administration of the mandated ordinance is the responsibility of the local government.

IV. SUCSESSES AND FAILURES OF THE PROGRAM

The shoreland and floodplain zoning programs are being implemented as intended in Wisconsin although neither program was implemented as quickly as was required by the Act. All counties have now adopted acceptable shoreland zoning ordinances. The last ordinance, however, was not adopted until almost three years after the 1968 deadline. Forty of seventy counties have adopted floodplain ordinances as required by the Act and 300 of 500 cities and villages with a need for floodplain ordinances have adopted acceptable ordinances. A spokesman for the Department indicated that the failure of many cities and counties to adopt floodplain ordinances is only partially due to local resistance to state-imposed land use programs. Many local governments which would be willing to adopt appropriate ordinances have been unable to do so because the Department has not been able to impose ordinances on many counties and cities which refuse to adopt appropriate ordinances because the Department does not have the necessary data either to permit local adoption or state imposition of appropriate ordinances. <sup>18/</sup>

One problem area identified in independent analysis

of the Wisconsin programs has been the fact that only counties are required to adopt shoreland zoning ordinances. This factor greatly reduces the area covered by the program.<sup>19/</sup> A spokesman for the Department, however, stated that the Department does not perceive this to be a problem. He indicated that the purpose of the program is to preserve the natural environment of the state's many large, undeveloped water resource areas and that most of these areas lie in unincorporated portions of the state's counties. As a result, shoreland zoning ordinances have been adopted regulating development in most of the areas of critical concern.<sup>20/</sup>

Another problem area identified by independent analysis of the programs has been the lack of Department authority to enforce appropriate shoreland and floodplain zoning ordinances. Commentators have indicated that this lack of authority, when combined with local resistance, would seriously hinder the implementation of the programs.<sup>21/</sup> A Department spokesman stated that the Department is not aware of any significant reluctance on the part of local governments to enforce their zoning ordinances. The Department has found, at least with respect to the local governments with which it has had contact, that once a local government has adopted an ordinance, it generally

will take appropriate steps to enforce it.<sup>22/</sup>

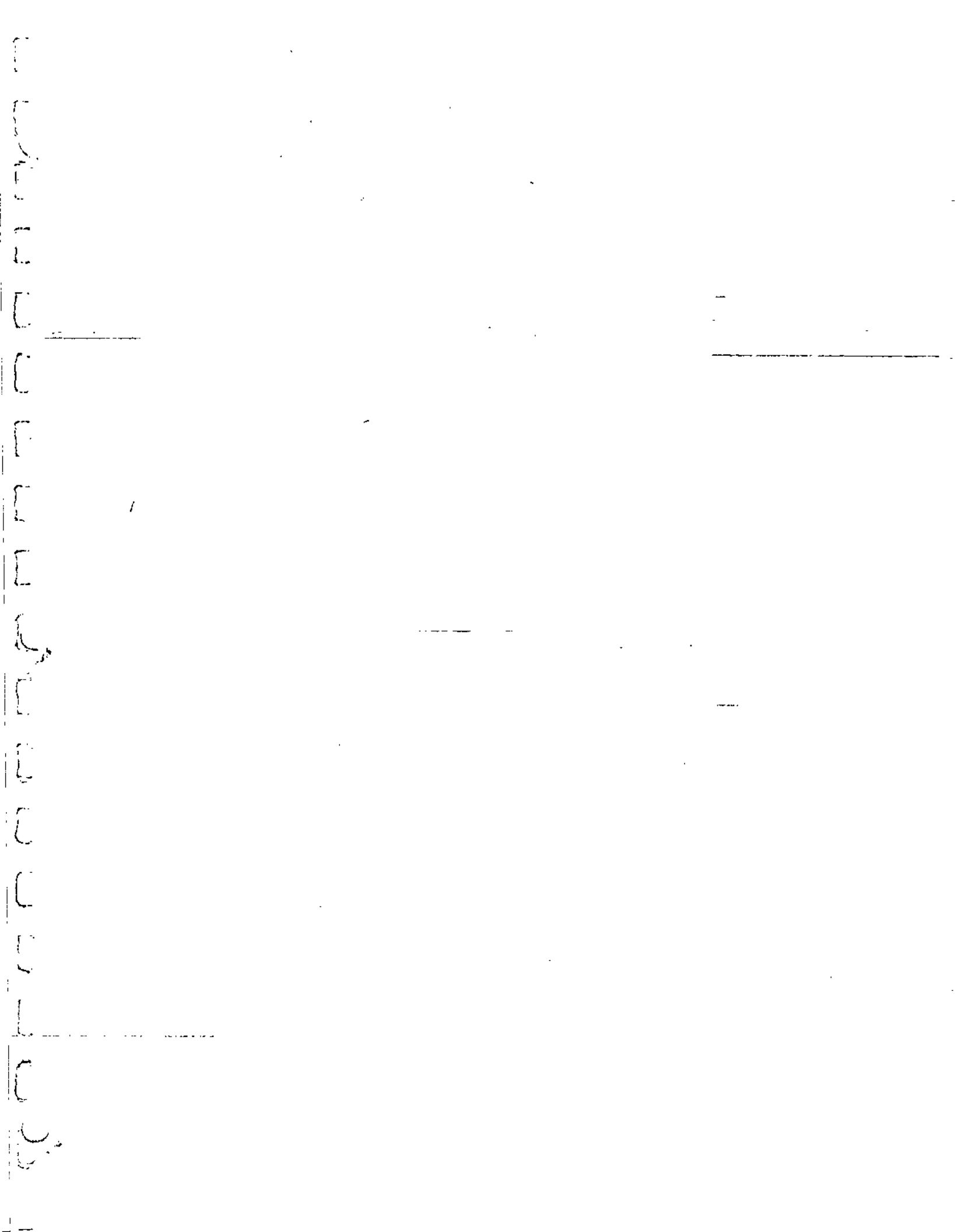
The most significant problem identified by the Department spokesman is lack of adequate staffing. Only nine staff members have been allocated to administer the programs on a full-time basis. In addition to these nine full-time staff members, 27 field staffers spend 10 to 20 percent of their time assisting in the administration of these programs. This shortage of staff has seriously delayed the Department in developing the data required by the local governments in adopting floodplain ordinances as well as making it difficult for the Department to oversee enforcement of the ordinances at the local level. The Department is confident that, with proper staffing, the program would be a very effective way to deal with the problems presented by shoreland and floodplain zoning.<sup>23/</sup>

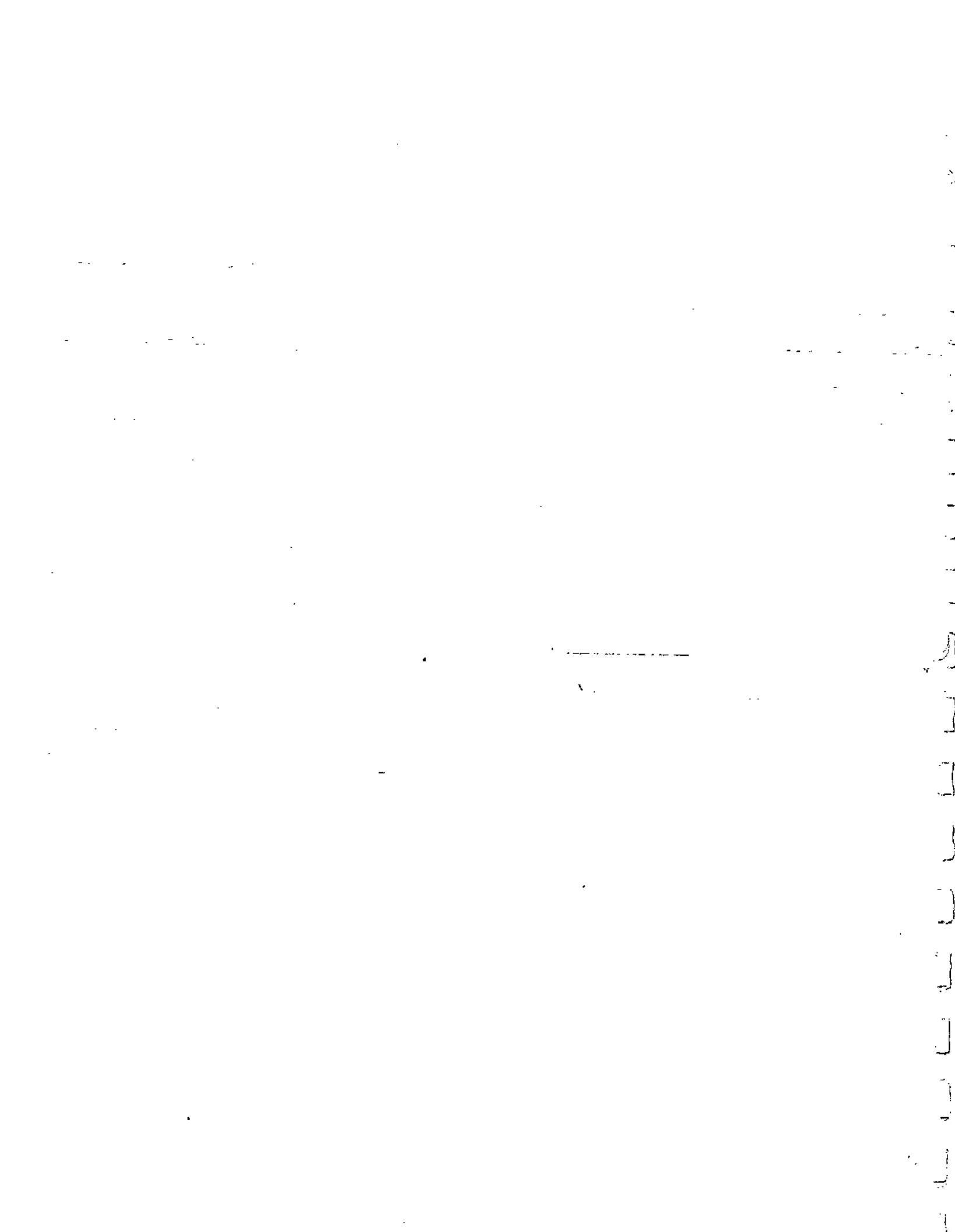
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FOOTNOTES

1. Wisc.Stat.Ann. § 144.26.
2. Id. § 87.30.
3. T. Frangos, "Environmental Protection," Wisconsin Conservation Bulletin, Nov.-Dec. 1968.
4. Wisc.Stat.Ann. § 144.26.
5. Wisc.Ad.Code § NR115.03.
6. "Wisconsin's Shoreland Protection Ordinance," prepared by the Dept. of Natural Resources, Division of Resource Development, Madison, Wisconsin.
7. Id. § 12.0.
8. Id. § 13.0.
9. Id. § 14.0.
10. Wisc.Stat.Ann. § 59.971(6).
11. Ibid.
12. Wisc.Ad.Code § NR116.01(1).
13. Id. § NR116.01(2).
14. Id. § NR116.13(1)(a).
15. Id. § NR116.14.
16. Wisc.Stat.Ann. § 87.30(1).
17. Id. §§ 59.971, 87.30.
18. Telephone conference with Mr. Mark Riebau, Assistant Chief, Bureau of Water and Shoreland Management, January 24, 1980.
19. F. Bosselman and D. Callies, The Quiet Revolution in Land Use Control, 247 (1971) [hereinafter cited as Bosselman and Callies].

20. Telephone conference with Mr. Mark Riebau, Assistant Chief, Bureau of Water and Shoreland Management, January 24, 1980.
21. Bosselman and Callies at 246.
22. Telephone conference with Mr. Mark Riebau, Assistant Chief, Bureau of Water and Shoreland Management, January 24, 1980.
23. Ibid.





CHAPTER 9

HACKENSACK MEADOWLANDS DEVELOPMENT  
COMMISSION

I. INTRODUCTION

This chapter provides a brief description of the Hackensack Meadowlands Development program and the agency that administers that program. Like many of the New Jersey programs discussed in the following chapter, we realize that most members of the commission and its staff are familiar with the Hackensack program. Nevertheless, we have included this brief summary which should be useful not only to the Commission, but also to the consultant team and general public for purposes of familiarization with a highly unique land development and management program that has been successfully implemented in New Jersey. Features of the Hackensack experience may provide insight to the Commission and its staff in determining which management techniques are likely to be most effective in New Jersey.

The Hackensack Meadowlands Development Commission (HMDC) is one of those bold experiments in regional regulation that is foreign to most American practice and convictions, and yet appears to be working. Because many Commission members may be familiar with the more fundamental organizational and jurisdictional components of the Hackensack program which are discussed in the following sections, we believe it appropriate to highlight some of the more unique



aspects of the program as a preface to the report that follows. These comments are based upon our work, observations, and familiarity with the operations of HMDC.

Two of the most remarkable aspects of the Meadowlands program are its Plan and its zoning regulations. This is said not because they are so unusual, but because they are not all that different. Both survive and are effective. The Plan is essentially an end use plan in an era when planners are highly critical of such schemes. Yet, HMDC seems to have as its polestar the light of the Plan, and as recently as last year in the Berry's Creek and Hartz Mountain conflict, HMDC stood by the Plan with remarkable vigor. With one exception, the original Plan remains unamended.

The zoning ordinance, although it has some novelities that will be noted later, has much that is standard. The staff of HMDC appears to swear by it. The requests for variations, currently about two a week, are steadily declining. Oddly enough, none of the specific provisions of the ordinance (for example, 50-foot setbacks from rivers) nor of the Commission's Wetlands Order have been challenged, and it seems clear that the longer HMDC operates under these rules, the more landowners come to accept them, thereby reducing the likelihood of a serious attack.

One interesting technique in the zoning ordinance is the creation of a Development Board consisting of the

Executive Director and Chief Engineer of the Commission, a Mayor of one of the constituent municipalities and two members of the Commission. This Board--not the Commission--hears all applications for development in Specially Planned Areas.

The two members of the Commission rotate on each hearing, so that at each hearing there are two different members of the Commission. The Board then makes a recommendation to the entire Commission. The rotation concept insures a refreshing new judgment on each development. Furthermore, the presence of two members of the staff (Executive Director and Chief Engineer) on the Development Board is a novel concept foreign to most land use commissions. It also raises interesting issues of conflict of interest between staff and commission.

A most daring provision in both the Plan and the zoning ordinance is the aforementioned concept of Specially Planned Areas (SPA). There are five types of SPA: Island Residential Areas, Parkside Residential Areas, Berry's Creek Center, Transportation Centers, and Special Use Areas. No development is permitted in SPA's unless it is pursuant to an approved plan that has been agreed upon by the owners of at least 80% of the entire area. Furthermore, SPA's have various open space requirements attached to them as well as certain design, developmental and operational controls that insure the integrity of the open space. The

most important aspect of the SPA concept, however, is the requirement that a substantial majority of landowners develop a plan for the entire area, including the area owned by any minority interests. Remarkably, there have been no legal challenges to this requirement, only unofficial protests. (A minority interest owner protested to the Berry's Creek application, for example, but was assuaged when given permission to build a hotel.)

A potentially troublesome conceptual issue exists with regard to HMDC's regulatory authority. Can HMDC issue guidelines to which local governments must conform their regulations but which are not specifically authorized by the state enabling act? HMDC's counsel is convinced that the Commission could impose such standards, but confesses that the question has not been definitively settled. A currently pending case raises the opposite side of the coin: a developer received permission to develop from HMDC but a municipal board of appeals denied a permit. He is now suing in Superior Court alleging that HMDC regulations override the local requirements.

Another small cloud on the horizon should be noted. Section 52:14-F1 of the New Jersey statutes provides for the Office of Administrative Law Judge. This statute establishes a group of administrative judges to hear all state administrative proceedings in which a controversy is to be resolved.

Thus far, HMDC has persuaded the Attorney General that such referral is not required in its case. There is still a possibility, however, that future hearings may have to be referred. Although HMDC concedes that referral would insure procedural due process to an applicant, it does see a potential for erosion of the Commission's Plan for the Meadowlands.

## II. THE PROGRAM

The Hackensack Meadowlands have been described as "a severely disrupted tidal marsh/estuary . . . surrounded by a vast urban complex . . ." <sup>1/</sup> The disruptions that have affected the Meadowlands include ditching, diking, use of insecticides, industrial pollution, road and rail building, dumping, filling, and dredging. Although much of this area has remained undeveloped because of low elevation and consequent periodic flooding, <sup>2/</sup> more than 7,000 acres have been subjected to various forms of scattered development and an extremely haphazard land-use pattern. <sup>3/</sup> Municipalities within the Meadowlands had historically scrambled to encourage the development of new industry and warehousing facilities in their jurisdictions, largely for tax reasons. <sup>4/</sup> Most of the Meadowlands area, however, where the natural land characteristics discourage planned comprehensive development, became an extensive garbage dump, receiving not only the noxious wastes of area industries, but also the solid

wastes of the entire surrounding region, which at one point amounted to 55,000 tons of garbage weekly.<sup>5/</sup> These factors in turn caused severe distress to the marsh/estuary ecosystem.<sup>6/</sup>

Finally, in 1968, the New Jersey legislature realized that the potential of the Meadowlands was being lost and passed the "Hackensack Meadowland Reclamation and Development Act."<sup>7/</sup> The legislature found the Meadowlands to be "a land resource of incalculable opportunity for new jobs, homes and recreational sites . . . ," whose comprehensive development, "due to their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses," could no longer be deferred.<sup>8/</sup> The legislators determined that the area required special protection from water and air pollution and special arrangements for the disposal of solid wastes. Furthermore, the legislators recognized the need to consider ecological factors and preserve the delicate balance of nature in evaluating artificially imposed developments. Thus, the Act provides for "a commission transcending municipal boundaries and a committee representing municipal interests which will act in concert to reclaim, plan, develop and redevelop the Hackensack Meadowlands."<sup>9/</sup>

### III. THE COMMISSION

#### A. Organization

HMDC was established "in, but not of" the New Jersey Department of Community Affairs (DCA). HMDC constitutes

"a political subdivision of the State established as an instrumentality exercising public and essential governmental functions." <sup>10/</sup> Thus, HMDC has been referred to as DCA's "semi-autonomous agency." <sup>11/</sup>

HMDC consists of seven members, the Commissioner of DCA (ex officio) and six citizens of the state, appointed by the governor with the advice and consent of the Senate. <sup>12/</sup> The Commissioner of DCA (or his designated alternate) serves on HMDC during his term of office. The other six members serve staggered 5-year terms. Members serve until their successors have been appointed and qualified. <sup>13/</sup> Vacancies are filled in the same manner as the original appointment for the unexpired term only. <sup>14/</sup> Any HMDC member may be removed for cause by the governor after a public hearing. <sup>15/</sup>

Of the six citizen members of HMDC, two must be residents of municipalities in Bergen County and two must be residents of municipalities in Hudson County. No more than one citizen may be appointed from any single municipality within the District, however. Furthermore, no more than three of the six may belong to the same political party. <sup>16/</sup>

The Act directs the governor to designate one HMDC member as chairman. HMDC members elect from their own number a vice-chairman and treasurer. The Act also authorizes HMDC to employ an executive director, chief fiscal officer, and such other staff, including officers, agents,

employees and experts, as it may require.<sup>17/</sup>

B. Jurisdiction and Authority

The Hackensack Meadowlands contain portions of woodland and meadows as well as waterway, tidal flow land, and marsh (both salt and fresh).<sup>18/</sup> The Meadowlands District,<sup>19/</sup> the area for which HMDC is responsible, falls within two New Jersey counties, Bergen and Hudson, and fourteen municipalities. The District covers approximately a 32-square mile area, running from Jersey City on the south to Little Ferry on the north, paralleling Manhattan two miles west of the Hudson River.<sup>20/</sup> Included in the vast urban complex that surrounds the area are Newark, Paterson, Passaic, Hackensack, and New York City.<sup>21/</sup> The Meadowlands area is the gateway to New Jersey from New York City.<sup>22/</sup>

The Act directs HMDC to prepare and adopt a master plan that sets forth standards for the comprehensive development of the District.<sup>23/</sup> Required components of the master plan were provisions for the location and use of buildings, structures, facilities, and land for solid waste disposal.<sup>24/</sup> The Act also authorized the inclusion of codes and standards covering land use, comprehensive zoning, subdivisions, building construction and design, housing, and the control of air and water pollution and solid waste disposal.<sup>25/</sup>

HMDC released its Master Plan in 1970. The Plan recommends that a substantial portion of the District be

set aside as permanent open space. In close proximity to the open areas are to be "islands" containing high-density, high-rise housing. Industrial facilities, research parks and warehousing are to be located in other specified areas. Finally, the western edge of the District was designated for a belt of medium density housing and a substantial regional shopping center, a sports complex, and other facilities of a regional nature. 26/

No building or other structure within the Plan area may be constructed or altered unless HMDC has approved plans and specifications for the work and issued a permit. 27/ HMDC also reviews and regulates all subdivisions and land development within the District. 28/ All building construction or alteration must meet with the engineering standards adopted by HMDC. 29/ Furthermore, all development proposals must comply with the Plan, provide adequate drainage facilities, easements, road improvements and water and sewer systems, and be accompanied by adequate performance guarantees and maintenance bonds. 30/

HMDC is more than a regulatory agency, however. The Act directs HMDC to provide solid waste disposal facilities that should relieve the need for the extensive dumping that has taken place in the Meadowlands. 31/ Pursuant to this directive, HMDC operates the world's largest garbage baler. 32/ This baler has the potential capacity to process 2,000 tons of solid waste per day. The baler represents a



considerable technical advance over sanitary landfills, and reduces the necessary amount of land for disposal by approximately 2-1/2 times. The baler also offers an opportunity for "recycling" acres of old, abandoned, and potentially dangerous landfills. 33/

HMDC is also authorized to undertake its own reclamation or redevelopment projects. 34/ In connection with these activities, HMDC has the power to issue bonds, 35/ impose special assessments, 36/ acquire property by purchase 37/ or condemnation, 38/ and accept gifts from and enter into cooperative arrangements with federal and local government agencies. 39/

#### IV. OTHER AGENCIES

The Meadowlands Act also provides for a "Hackensack Meadowlands Municipal Committee." 40/ This Committee is composed of the mayors (or their designated alternates) of the fourteen municipalities within the District. The Committee elects a chairman from among its members and may appoint such other officers as it deems necessary. The Committee may also use its appropriated funds to retain such staff as it may require. Each Committee member may serve only so long as he is the mayor of the municipality he represents. 41/

The Act requires HMDC to submit its proposed plans, codes, and standards to the Municipal Committee prior to taking any final action on them. 42/ The Committee may

then make recommendations on the modification or approval of those items within 45 days. <sup>43/</sup> Furthermore, the Committee may also make recommendations to HMDC "on any matter it deems advisable" whether or not that matter had been submitted to the Committee for review. <sup>44/</sup>

The Municipal Committee is in effect only an advisory body, however. Any Committee veto or rejection of HMDC proposals may be overturned by a 5/7 vote of HMDC. <sup>45/</sup> It has been said that the Municipal Committee was established merely to placate constituents in the fourteen municipalities within the Meadowlands District. <sup>46/</sup>

#### V. LOCAL GOVERNMENT PARTICIPATION

One commentator has stated that under the Meadowlands Act, "for the first time in New Jersey's history, the theology of local control has been reformed under the obvious need for more effective and comprehensive planning." <sup>47/</sup>

In preparing its Master Plan, HMDC was merely to "give due consideration" to existing patterns of development in the constituent municipalities and to any other plans of development adopted by any of the constituent municipalities. <sup>48/</sup> The Act also requires HMDC to consider such local plans before amending its Master Plan in any manner. <sup>49/</sup> This later requirement is unlikely to result in any significant local input either, however, since at its inception the Act rendered null and void local codes that were inconsistent with the Master Plan and encouraged District municipalities to

enact zoning ordinances and other codes and standards that would "effectuate the purposes of [HMDC's] master plan." <sup>50/</sup>

The Act circumscribes local authority and decision-making in other respects as well. First, municipalities must refer all municipal projects to HMDC for review and approval before taking any action on the project requiring the expenditure of public funds. <sup>51/</sup> Second, applications for subdivisions, site plans or building permits must be submitted to HMDC for approval prior to approval by the applicable local government. <sup>52/</sup> Furthermore, the local governments are precluded from taking any final action on subdivision applications until they have received HMDC's report on that application. <sup>53/</sup> In both cases, however, applications are deemed to have been approved if HMDC fails to respond within 45 days. <sup>54/</sup> Finally, the Act requires that HMDC be given notice of and be considered a party in interest at any municipal or county hearing regarding "the adoption or amendment of a master plan, official map, zoning or subdivision regulations, or . . . the granting of variances or special exceptions, involving property within the district or within 200 feet of its borders." <sup>55/</sup>

Two provisions in the Act do appear to mitigate to some extent the lack of local participation in the Meadowlands program, however. The first is the provision for the Hackensack Meadowlands Municipal Committee, which was discussed above. <sup>56/</sup> The second is the provision for the establishment of an intermunicipal tax-sharing account.

The Act provides for

the creation of an intermunicipal account, and specifically provides that each constituent municipality will be guaranteed, in perpetuity, against loss of its present existing tax ratable values within the meadowland district occurring by reason of the acquisition of taxable real property, through purchase, eminent domain or gift, by a governmental body or agency to be used for a public purpose, to the extent that such loss of existing tax ratable values is not offset by increased true value of the remaining taxable real property within the district, and will equitably share in the new financial benefits and new costs resulting from the development of the meadowland district as a whole. 57/

In essence, this account insures that the towns designated to receive extensive development would share the revenue generated thereby with those towns zoned for open space or wetlands preservation.

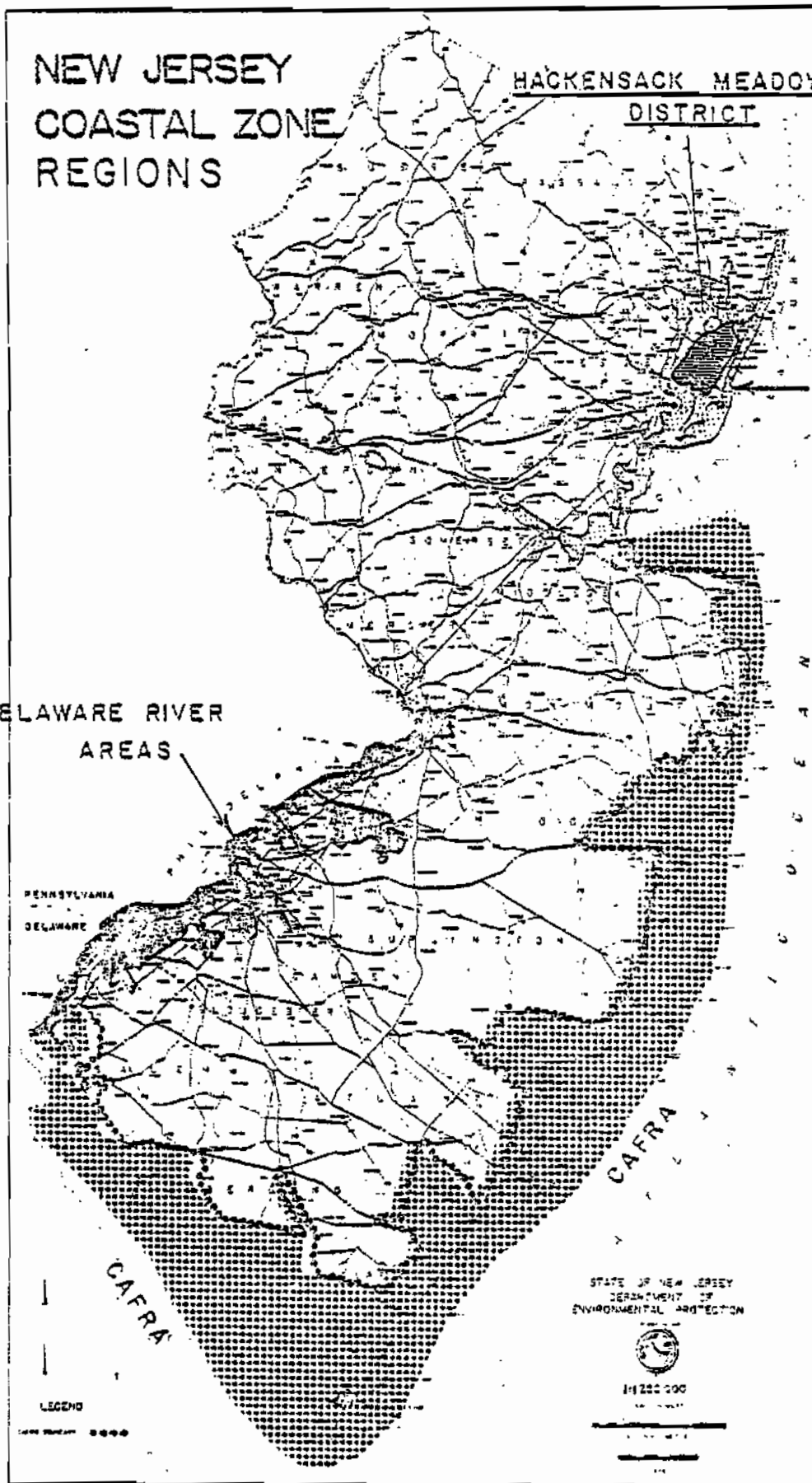
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FOOTNOTES

1. Nelson, Crazy-Quilting the Jersey Meadows, LANDSCAPE ARCHITECTURE 42-43 (January, 1974).
2. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 293 (1971) [hereinafter cited as QUIET REVOLUTION].
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14. Id.
15. Id. §13:17-5(d).
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17. Id. §13:17-5(g).
18. Grant, Turning It Around in the Hackensack Meadowlands, URBAN LAND 15 (November, 1976).
19. For a detailed legal description of the District, see N. J. STAT. ANN. §13:17-4 (West 1979).

20. Grant, supra note 18, at 15. For an illustration of District's location, see Appendix A.
21. Nelson, supra note 1, at 42.
22. Grant, supra note 18, at 15.
23. N. J. STAT. ANN. §13:17-9 (West 1979).
24. Id. §13:17-11(a).
25. Id. §13:17-11(b).
26. QUIET REVOLUTION, supra note 2, at 295.
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36. Id. §13:17-6(l).
37. Id. §13:17-6(g).
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39. Id. §13:17-6(h).
40. Id. §13:17-7.
41. Id.
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44. Id. §13:17-8(d).
45. Id. §13:17-8(c).
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50. Id. §13:17-11(b).
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DELAWARE RIVER AREAS

HACKENSACK MEADOWLANDS DISTRICT

NORTHERN WATERFRONT AREA

PENNSYLVANIA  
DELAWARE

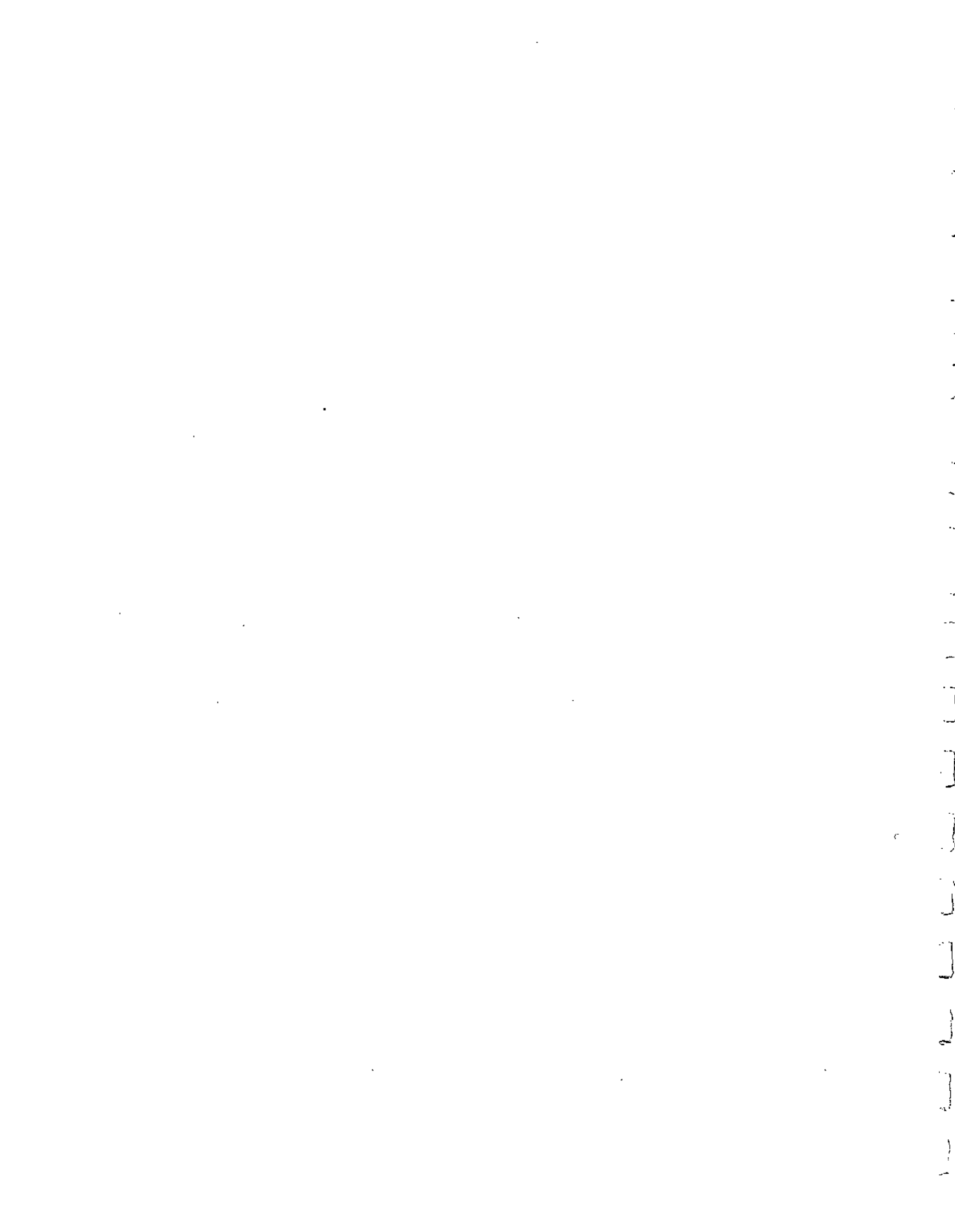
STATE OF NEW JERSEY  
DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

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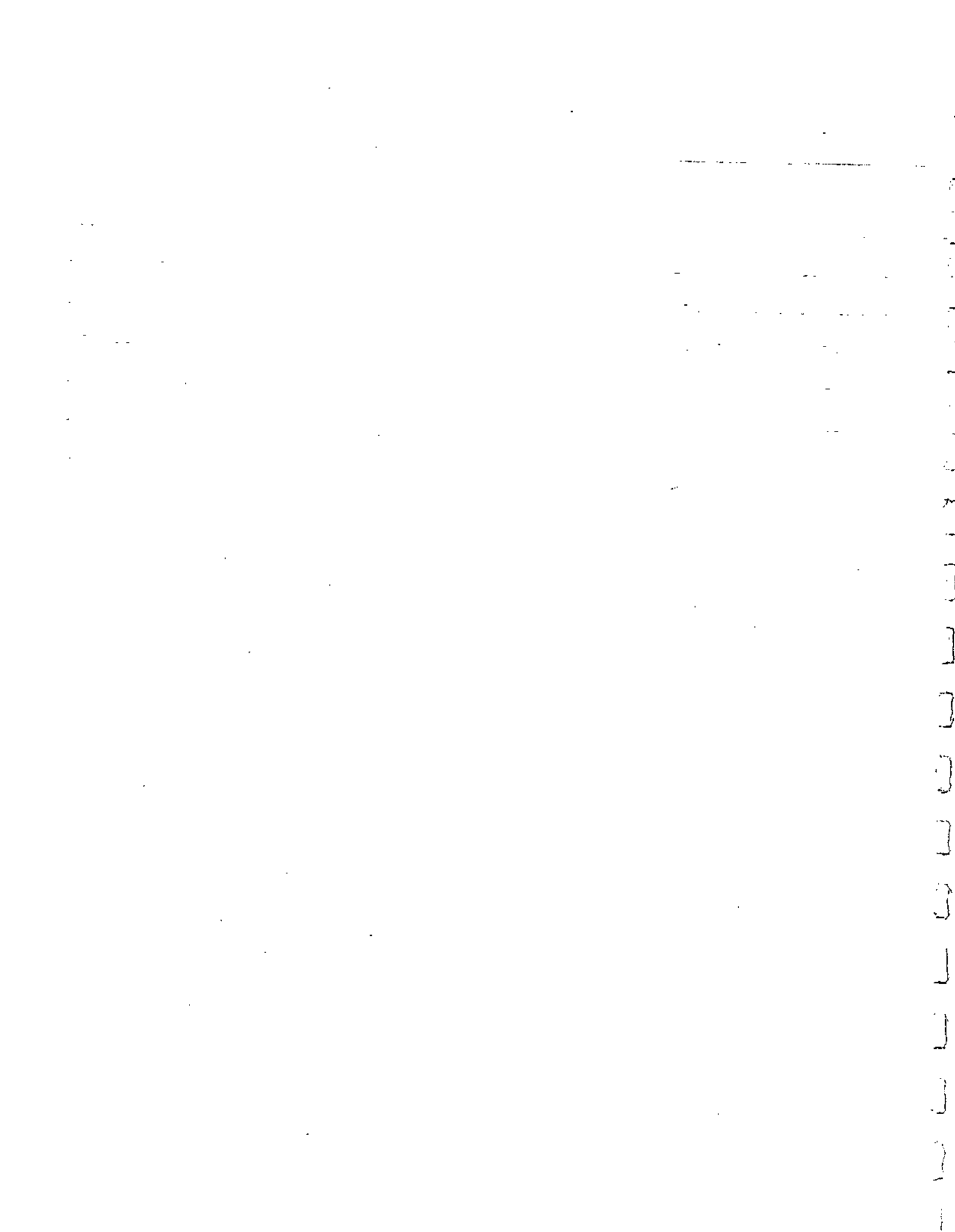
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New Jersey Department of Environmental Protection, Coastal Management Strategy for New Jersey 16 (1977)









CHAPTER 10

NEW JERSEY ENVIRONMENTAL PROGRAMS

I. INTRODUCTION

This chapter describes a number of existing New Jersey programs (with the exception of the Hackensack Meadowlands program, which is described in the preceding chapter) which may be of special relevance to the Pinelands. We recognize that these programs may be familiar to the Commission and its staff but nevertheless felt this brief recapitulation would be useful, especially for members of the consultant team and the general public, as a summary of the most significant state agencies and programs with which the Pinelands Commission and its programs will have to interface and interact. In addition, review of the procedural and substantive components of these familiar programs may aid the Commission and the staff in identifying and communicating to the consultant team program features which are believed to have special strengths or weaknesses in the New Jersey setting. In the next phase of our work, we will, to the extent it appears useful, in light of the work of other members of the consultant team, conduct field interviews with the administrators of some of these programs for the purposes of determining their attitudes toward future interaction with the Pinelands program and of obtaining their assessments of the strengths and weaknesses of their programs as effective planning and management tools.

II. THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

Many of the major existing New Jersey land management programs are administered by the State Department of Environmental Protection (DEP). DEP was created by the state legislature in 1970 and given broad authority to "formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State."<sup>1/</sup> Several specific powers and duties of DEP which are enumerated in the statute include the following:

- a. Conduct and supervise research programs . . . ;
- b. Conduct and supervise Statewide programs of education . . . ;
- c. Require the registration of persons engaged in operations which may result in pollution of the environment and the filing of reports by them . . . ;
- d. Enter and inspect any building or place for the purpose of investigating an actual or suspected source of pollution of the environment and ascertaining compliance or noncompliance with any code, rules and regulations of the department;
- e. Receive or initiate complaints of pollution of the environment, including thermal pollution, hold hearings in connection therewith and institute legal proceedings for the prevention of pollution of the environment and abatement of nuisances in connection therewith and shall have the authority to seek and obtain injunctive relief and the recovery of fines and penalties in summary proceedings in the Superior Court;

f. Prepare, administer and supervise Statewide, regional and local programs of conservation and environmental protection, giving due regard for the ecology of the varied areas of the State and the relationship thereof to the environment, and in connection therewith prepare and make available to appropriate agencies in the State technical information concerning conservation and environmental protection, cooperate with the Commissioner of Health in the preparation and distribution of environmental protection and health bulletins for the purpose of educating the public, and cooperate with the Commissioner of Health in the preparation of a program of environmental protection;

g. Encourage, direct and aid in coordinating State, regional and local plans and programs concerning conservation and environmental protection in accordance with a unified Statewide plan which shall be formulated, approved and supervised by the department. In reviewing such plans and programs and in determining conditions under which such plans may be approved, the department shall give due consideration to the development of a comprehensive ecological and environmental plan in order to be assured insofar as is practicable that all proposed plans and programs shall conform to reasonably contemplated conservation and environmental protection plans for the State and the varied areas thereof;

h. Administer or supervise programs of conservation and environmental protection, prescribe the minimum qualifications of all persons engaged in official environmental protection work, and encourage and aid in coordinating local environmental protection services;

i. Establish and maintain adequate bacteriological, radiological and chemical laboratories . . . ;

j. Administer or supervise a program of industrial planning for environmental protection; encourage industrial plants in the State to

undertake environmental and ecological engineering programs . . . ;

k. Supervise sanitary engineering facilities and projects within the State, authority for which is now or may hereafter be vested by law in the department, and shall, in the exercise of such supervision, make and enforce rules and regulations concerning plans and specifications, or either, for the construction, improvement, alteration or operation of all public water supplies, all public bathing places, land fill operations and of sewerage systems and disposal plants for treatment of sewage, wastes and other deleterious matter, liquid, solid or gaseous, require all such plans or specifications, or either, to be first approved by it before any work thereunder shall be commenced, inspect all such projects during the progress thereof and enforce compliance with such approved plans and specifications;

l. Undertake programs of research and development for the purpose of determining the most efficient, sanitary and economical ways of collecting, disposing or utilizing of solid waste;

m. Construct and operate, on an experimental basis, incinerators or other facilities for the disposal of solid waste . . . ;

n. Enforce the State air pollution, water pollution, conservation, environmental protection, waste and refuse disposal laws, rules and regulations;

o. Acquire by purchase, grant, contract or condemnation, title to real property, for the purpose of demonstrating new methods and techniques for the collection or disposal of solid waste;

p. Purchase, operate and maintain, pursuant to the provisions of this act, any facility, site, laboratory, equipment or machinery necessary to the performance of its duties pursuant to this act;

q. Contract with any other public agency or corporation incorporated under the laws of this or any other state for the performance of any function under this act;

r. With the approval of the Governor, cooperate with, apply for, receive and expend funds from, the Federal Government, the State Government, or any county or municipal government or from any public or private sources for any of the objects of this act . . . . 2/

DEP is designated as being within the Executive Department of New Jersey state government and is responsible to the New Jersey Legislature and Governor.<sup>3/</sup> The administrator and head of DEP is the Commissioner of Environmental Protection (Commissioner).<sup>4/</sup> DEP is organized into five operating "Divisions," which in turn each contain several "Offices." DEP's Division of Marine Services, for example, embraces the Office of Coastal Zone Management, the Office of Wetlands Management, and the Office of Riparian Lands Management. Specific functions and responsibilities have been delegated to each Division. In addition, several other planning and administrative functions are performed by DEP outside the context of the five operating Divisions.<sup>5/</sup>

DEP's Division of Marine Services is specifically responsible for the development and implementation of the New Jersey Coastal Management Program<sup>6/</sup> which was initiated pursuant to the federal Coastal Zone Management Act.<sup>7/</sup> The Division's Office of Coastal Zone Management serves as lead agency for that program as well as for New Jersey's Coastal



Area Facility Review Act (CAFRA) permit program. Furthermore, the Division's Offices of Wetlands Management and Riparian Lands Management administer the Wetlands permit program and waterfront development and riparian real estate permit program, respectively. This Division also regulates water activities such as clamming, skin diving and vessel anchoring.<sup>8/</sup>

DEP's Division of Water Resources is responsible for water quality planning and maintenance and for flood plain management. The Division also has regulatory authority over the building or alteration of structures within stream areas and over development and land use in designated floodways. - Finally, the Division of Water Resources is also responsible for supervising the development of a Water Supply Master Plan which is to assess short and long-term water needs, evaluate alternative answers to those needs, and provide a framework for future planning and management of New Jersey's water supplies.<sup>9/</sup>

The Division of Environmental Quality within DEP is responsible for air quality planning and monitoring. This Division is the designated agency for administration of the federal Clean Air Act in New Jersey. The Division is also responsible for the State's radiation, noise and pesticide control programs.<sup>10/</sup>

The Division of Parks and Forestry manages New Jersey's parks. The Division is also responsible for

acquiring, operating and maintaining historic sites. The Division's Office of Historic Preservation maintains the State Register of Historic Places and recommends to the Commissioner state nominations to the National Register of Historic Places.<sup>11/</sup>

DEP's Division of Fish, Game and Shellfisheries is responsible for managing New Jersey's fish and wildlife resources. As part of its management responsibilities, the Division conducts research and educational programs. The Division also enforces state fish and game laws and maintains fish and wildlife management areas.<sup>12/</sup>

New Jersey's Green Acres & Recreation Program is also administered by DEP. In this regard, DEP basically determines where and how state funds should be spent for park and open space acquisition, development and maintenance. Recreation planning is also the responsibility of the Green Acres staff, and is guided by the New Jersey Comprehensive Outdoor Recreation Plan.<sup>13/</sup> A more extensive discussion of the Green Acres Program appears in a subsequent section of this chapter.

The Solid Waste Administration (SWA) of DEP is responsible for the development of a statewide plan to maximize resource recovery and minimize the adverse environmental impacts of solid waste. SWA has divided the State into 22 districts (21 counties and the Hackensack Meadowlands

Development Commission District) which are each responsible for developing a 10-year plan to meet the solid waste needs of each municipality within their boundaries. SWA is responsible for coordinating the district planning through the development of a statewide plan and the provision of planning guidelines.<sup>14/</sup>

Finally, DEP also has a Department Administration Section which is responsible for such elements as personnel, capital improvements and fiscal operations. The Office of the Commissioner also performs several administrative functions.<sup>15/</sup>

### III. NEW JERSEY COASTAL PROGRAMS

#### A. Coastal Area Facility Review Act (CAFRA) N. J. STAT. ANN. § 13:19-1 et seq.

##### 1. Introduction - The Federal Coastal Zone Management Act of 1972 16 U.S.C.A. §§ 1451 et seq.

This federal legislation provided the impetus for New Jersey, as well as the other thirty-three eligible coastal states, to design and implement a coastal zone management program. Thus, a brief summary of the federal legislation will be presented as an introduction to the discussion of the CAFRA program.

In 1972, Congress passed the federal Coastal Zone Management Act (CZMA).<sup>16/</sup> Commentators have referred to this legislation as "the most important indirect program for

coastal land management."<sup>17/</sup> The CZMA states that "[t]here is a national interest in the effective management, beneficial use, protection and development of the coastal zone," but maintains that the key to achieving these goals "is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone."<sup>18/</sup>

The CZMA provides two major incentives for state participation. First, significant amounts of federal funds are made available to the states for development and administration of coastal management programs,<sup>19/</sup> for coastal energy impact program assistance,<sup>20/</sup> and for acquisition of "estuarine sanctuaries," public beaches, or other public coastal areas.<sup>21/</sup> Second, the CZMA provides a potentially effective means for gaining leverage over certain federal decisions affecting a state's coastal zone. Those means are several CZMA provisions, pertaining to federal activities, licenses and permits (including those affecting the outer continental shelf), and assistance, that require consistency with approved state programs.<sup>22/</sup> Potentially, these "consistency clauses" could give participating states "unprecedented capacity to influence significant federal decisions

in the state's coastal zone"; however, the federal government has retained certain overriding powers.<sup>23/</sup>

The CZMA gives to each participating state a wide degree of latitude in designing its coastal management program. The states may choose from any one or combination of the following allocations of land and water regulatory powers between state and local governments:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.<sup>24/</sup>

For example, the California coastal program uses mainly techniques (A) and (C) and enables local governments to become the major participants in California's coastal management process.<sup>25/</sup> The New Jersey approach, on the other hand, corresponds to management technique (B).<sup>26/</sup> The CZMA requires that state management programs include the following elements: (1) coastal zone boundaries, (2) permissible land and water uses, (3) areas of particular concern, (4) means of proposed state control over land and water uses, including

relevant statutory and constitutional provisions as well as judicial decisions, (5) use priority guidelines, (6) proposed organizational structure of the management program, including the interrelationships of local, regional, state and interstate agencies, (7) a definition of the term "beach" and a planning process for the protection of beaches and other public coastal areas, (8) a planning process for energy facilities, and (9) a planning process for assessing, studying and controlling erosion.<sup>27/</sup> Although federal regulations provide some criteria for each of these areas, the specific delineations, policies, and procedures are left to the states.<sup>28/</sup>

## 2. The CAFRA Program

The New Jersey Coastal Area Facility Review Act became law in 1973. The law charges DEP with the responsibility of preparing comprehensive programs and policies to protect the environment of New Jersey's coastal area.<sup>29/</sup>

The CAFRA area covers 1,376 square miles, encompassing 18% of the state's land and more than 75% of its waters.<sup>30/</sup> The statutory area extends from Raritan Bay and Sandy Hook at the northern end, south to Cape May and then north and west along the Delaware estuary to the Delaware Memorial Bridge. It ranges in width from a few thousand feet to 24 miles. The CAFRA boundaries extend to the three-mile territorial limit along the Atlantic coast, to the

New York boundary in Raritan Bay and to the Delaware boundary in Delaware Bay.<sup>31/</sup> It should be noted, however, that the CAFRA permit process does not apply in any coastal area that is also regulated under the Wetlands Act. A discussion of the Wetlands Act appears in the next section of this chapter.<sup>32/</sup>

The CAFRA area encompasses ocean and bay beaches, wetlands, pine forests, the intercoastal waterway, and prime agricultural land. It also includes old, established residential communities, newly developing suburbs, and the principal ocean-oriented resort and recreation communities of the state. Portions of the Pinelands that lie in Atlantic, Ocean and Burlington Counties fall within the CAFRA boundary. The legislative findings in CAFRA declared that the coastal area

should be dedicated to those kinds of land uses which promote the public health, safety and welfare, protect public and private property, and are reasonably consistent and compatible with the natural laws governing [its] physical, chemical and biological environment . . . .<sup>33/</sup>

The legislation also recognizes, however, "the legitimate economic aspirations of the inhabitants of the coastal area," and states that compatible land uses should be developed

in order to improve the overall economic position of the inhabitants of that area within the framework of a comprehensive environmental design strategy which preserves the most ecologically sensitive and fragile area from

inappropriate development and provides adequate environmental safeguards for the construction of any facilities in the coastal area. <sup>34/</sup>

Thus, CAFRA serves as both environmental protection and economic development legislation and requires a balanced approach to land use control. This feature has led CAFRA to be termed "one of the unique instruments administered by an environmental protection agency in this country." <sup>35/</sup>

CAFRA requires the acquisition of a permit from DEP as a prerequisite to construction of any "facility" in the statutory coastal area. <sup>36/</sup> The statutory definition of facility includes any facilities designed or utilized for the following purposes: (1) electric power generation, including oil, gas, coal fired or nuclear facilities; (2) food and food by-products production; (3) incineration wastes; (4) paper production; (5) agri-chemical production; (6) mineral products, chemical processes, metallurgical processes and inorganic salt and salt manufacture; (7) marine terminals and cargo handling facilities and storage facilities; and (8) public facilities and housing, including housing developments of 25 or more dwelling units, roads and airports, parking facilities with 300 or more spaces, wastewater treatment facilities and sanitary landfills. <sup>37/</sup> The statute states that the permit application must include an environmental impact statement (EIS) and such other information as the DEP may prescribe. <sup>38/</sup> The



statute specifically requires that the EIS include an inventory of existing environmental conditions, a project description, a list of all required licenses, permits or other approvals, an assessment of environmental impact, a list of adverse environmental impacts that cannot be avoided, the steps to be taken to minimize adverse environmental impacts, alternatives to the project (or portions thereof) with reasons for their acceptability or non-acceptability, and a list of any published information regarding the project, or the project site and surrounding region.<sup>39/</sup>

The application process usually begins with an optional pre-application conference.<sup>40/</sup> These conferences were devised by DEP in order to frankly discuss the strengths and weaknesses of proposed projects and possible revisions or alterations which could increase the likelihood of project approval.<sup>41/</sup> The next step would be submission of the actual CAFRA permit application. The application must include twenty copies of the EIS, which are distributed to other appropriate state and local agencies for review and comment.<sup>42/</sup>

Next, DEP staff prepares a written preliminary analysis of the application in order to provide the applicant and the public with an initial appraisal of the application. Although this preliminary analysis is not required by CAFRA, it helps to avoid some disputes by applicants and

the public and provides an opportunity for consideration of DEP views prior to the public hearing.<sup>43/</sup>

Fourth, the Commissioner of DEP holds a public hearing on each CAFRA application.<sup>44/</sup> The hearing provides a forum for public scrutiny of both the development proposal and the likely DEP decision well in advance of the formal determination. The hearing and comment stimulated by it bring additional information to DEP which can be considered before making a final decision. Furthermore, the developer may modify the application at any time before the final decision, on the basis of the preliminary analysis and public reaction.<sup>45/</sup> Finally, all of the information received during the process is reviewed by DEP staff and the Commissioner decides to approve, conditionally approve, or deny the application.<sup>46/</sup>

CAFRA states that a permit shall be issued only if DEP finds that the proposed facility:

- a. Conforms with all applicable air, water and radiation emission and effluent standards and all applicable water quality criteria and air quality standards.
- b. Prevents air emissions and water effluents in excess of the existing dilution, assimilative, and recovery capacities of the air and water environments at the site and within the surrounding region.
- c. Provides for the handling and disposal of litter, trash, and refuse in such a manner as to minimize adverse environmental effects and the threat to the public health, safety and welfare.

d. Would result in minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies.

e. Would cause minimal feasible interference with the natural functioning of plant, animal, fish, and human life processes at the site and within the surrounding region.

f. Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety and welfare.

g. Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing scenic and aesthetic attributes at the site and within the surrounding region. <sup>47/</sup>

The CAFRA permit decision may be appealed administratively to the Coastal Area Review Board. <sup>48/</sup> This Board is composed of the Commissioner of Environmental Protection, and the Commissioners of Community Affairs and Labor and Industry. <sup>49/</sup> The Board may modify any CAFRA permit granted, grant a permit that had been denied, or confirm the grant of a permit. <sup>50/</sup> While the matter is before the Board, informal conferences and negotiations may be held between DEP, the developer, and other dissatisfied persons in an attempt to resolve conflicts. <sup>51/</sup> If the post decision administrative process does not satisfy all parties, the CAFRA determination may be appealed to the courts.

In Toms River Associates v. Department of Environmental Protection, <sup>52/</sup> CAFRA was constitutionally

attacked on the bases of delegation of zoning authority, special legislation, and taking without compensation. In addition, the CAFRA decision in that case was attacked as not supported by the factual record and as an arbitrary exercise of discretion. The court rejected all of these arguments and upheld CAFRA and the subject permit decision in all respects.<sup>53/</sup>

B. Wetlands Act of 1970  
N. J. STAT. ANN. § 13:9A-1 et seq.

The New Jersey Wetlands Act was signed into law on November 5, 1970. In that legislation, the state legislature declared that the Wetlands area

protects the land from the force of the sea, moderates our weather, provides a home for waterfowl and for two-thirds of all our fish and shellfish, and assists in absorbing sewage discharge by the rivers of the land. . . .<sup>54/</sup>

Thus, the legislature found that it was "necessary to preserve the ecological balance of [the] area and prevent its further destruction," and designated DEP as the regulatory agency responsible for achieving that goal.<sup>55/</sup> DEP was directed to inventory and map all wetlands within the state.

The Act contains a definition of "coastal wetlands,"<sup>56/</sup> and DEP has designated the regulated areas by county and has recorded wetlands maps in each affected county as required by statute. The Wetlands encompass approximately 243,500 acres -- about 500 square miles. The Wetlands are not contiguous; they lie within 11 of New Jersey's 21 counties

and within the boundaries of more than 100 of the state's 576 municipalities.<sup>57/</sup> Several scattered Wetlands areas lie within the Pinelands. It should be noted that the land subject to the jurisdiction of the Hackensack Meadowlands Development District is specifically excluded from Wetlands regulation.

The Act prohibits the conduct of any "regulated activity" without a permit issued by DEP.<sup>58/</sup> Regulated activities include, but are not limited to:

draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein any rubbish or similar material or discharging therein liquid wastes, either directly or otherwise, and the erection of structures, drivings of pilings, or placings of obstructions, whether or not changing the tidal ebb and flow.<sup>59/</sup>

The dumping of solid wastes, the discharging of sewage and the storage or application of pesticides are absolutely prohibited by DEP's Wetlands Regulations.<sup>60/</sup> The regulations divide the remaining regulated activities into two categories, Type A and Type B.<sup>61/</sup> Type A permits are required for relatively minor projects such as catwalks, bulkheading and maintenance of existing utilities, and involve an abbreviated review procedure. For larger projects such as erecting structures, filling, or excavating, a more intensive review is required under the Type B permit procedure.<sup>62/</sup>

As in the case of CAFRA applications, Wetlands permit applicants are encouraged to arrange a pre-application

conference with DEP staff to discuss their project and potential areas of conflict. Applications for either type of permit must include a completed DEP Construction Permit Application,<sup>63/</sup> a completed Wetlands Permit Application Form,<sup>64/</sup> a permit fee, evidence of application for all required riparian grants, licenses, or permits, a map showing the location of the proposed activity, including filling, excavation and structure sites, and a list of names and addresses of owners of adjacent lots.<sup>65/</sup> In addition, Type B permit applications must include a detailed environmental impact statement.<sup>66/</sup> This EIS must describe the project and its impact in considerable detail, including the project's effect upon the site itself and upon other areas in the vicinity, with particular reference to the protection, preservation and enhancement of the natural environment and the preservation of the ecological balance of the Wetlands. The EIS must also state reasons why any structures involved cannot be located on lands other than Wetlands, the temporary and permanent physical changes which will take place pursuant to the proposed activity, alternatives to the proposed activity which would reduce environmental damage, and the measures to be taken during and after completion of the proposed activity to reduce detrimental effects.<sup>67/</sup>

Both Type A and Type B permits are reviewed by the staff of the DEP's Office of Wetlands Management.

Public hearings on Wetlands permit applications are not mandatory, but may be held if the staff determines that a hearing would be in the public interest in a particular case. <sup>68/</sup> Permits are to be issued only if it is found that the proposed project:

Requires water access or is water oriented as a central purpose of the basic function of the activity.

Has no prudent or feasible alternative on a non-Wetland Site.

Will result in minimum feasible alteration or impairment of natural tidal circulation.

Will result in minimum feasible alteration or impairment of the natural contour or the natural vegetation of the wetlands. <sup>69/</sup>

The extent of inquiry under a Type B permit review is more extensive than that for a Type A permit. In the case of a Type B review, the regulations require consideration of the following factors:

The degree to which the proposed activity serves the public need and interest and the free public access to beaches and navigable waters.

The degree to which marine and/or land traffic generated by the proposed activity will give rise to traffic flow and safety problems.

The degree to which any aspect of the food chain or plant, animal, fish or human life processes are affected adversely within or beyond the activity area.

The degree to which filling and excavation activities can be minimized.

The degree to which filling and excavation creates stagnant water conditions, fish entrapments and

flood control or preservation of land for a park or recreational area, but rather to preserve the land for ecological reasons in its natural environment without change, the consideration of reasonableness of the exercise of the police power must be redetermined. The issue then presented is a determination of which interest shall prevail, the public interest in stopping the despoilation of natural resources or the right of an individual to use his property as he wishes. The focus of the reason for that specific governmental action changes the concept of legislation for the public good to legislation to prevent public harm, which prevention must then be weighed against the owner's undiminished right to use his property. 76/

The court then concluded that the owner's desire to permit the original state of his land to "give way to a pile of dredge soil" was not a reasonable use that should be exempted from Wetlands regulation. 77/

Judicial acceptance of the Wetlands Act was also demonstrated in Sands Point Harbor, Inc. v. Sullivan. 78/

In that case, a landowner challenged the Act itself and DEP's designation of regulated Wetlands on equal protection grounds as well as on a theory of taking without just compensation. The court upheld the Act as well as the administrative order, however, holding that

[r]egulation of the use of marshes and wetlands having environmental and ecological importance to the continued existence of species of wild-life and to mankind is a valid exercise of governmental power. 79/

C. Waterfront Development (Riparian Permits)  
N.J. Stat. Ann. §12:5-1 et seq.

Riparian lands, defined as lands now or formerly



deposit sumps.

The degree to which the proposed activity controls erosion.

The degree to which the proposed activity provides facilities for the proper handling of litter, trash, refuse and sanitary and industrial wastes.

The degree to which the proposed activity alters natural water flow or water temperature.

The degree to which irreplaceable land types will be destroyed.

The degree to which the natural, scenic and aesthetic values at the proposed activity site can be retained.

The degree to which the proposed activity ecologically enhances the estuarine environment.

The degree of danger arising from hurricanes, floods or other determinable and periodically recurring natural hazards. 70/

Applications may be denied if DEP finds that the proposed activity violates or tends to violate the purposes and intent of the Wetlands Act or Regulations. Alternatively, an application may be approved with such conditions imposed upon it as are deemed necessary to safeguard the Wetlands environment. 71/

If a permit application is denied, an applicant may revise the project and resubmit the application. The Act further provides that an applicant who is denied a permit may, within 90 days of the denial, file a complaint in New Jersey Superior Court "to determine whether [the decision]

so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof and is therefore an unreasonable exercise of the police power because the [decision] constitutes the equivalent of a taking without compensation."<sup>72/</sup>

In a 1978 case, American Dredging Co. v. Department of Environmental Protection,<sup>73/</sup> the landowner challenged DEP's denial of a permit to deposit dredge soil on his 80-acre tract. The owner submitted evidence regarding the reduced value of his land caused by Wetlands regulation and argued that the regulation constituted a taking without payment of just compensation. The court replied, however, that

[m]ere diminution in economic value caused by the governmental restriction on the free use of land has not mandated a determination of taking as an excessive use of the police power.<sup>74/</sup>

\* \* \*

Additionally, the lowering of value of the wetlands, as testified to by plaintiff's expert, by reason of the Wetlands designation is not a depreciation of the use of the land in its natural state but of what the land could be worth if it could be filled.<sup>75/</sup>

In commenting on the Act in general, the court noted that

[t]he thrust of the Wetlands Act is the prevention of harm to the public, not the enhancement or improvement of a governmental activity or purpose . . . . Where the effect of the governmental prohibition against use is not in the furtherance of a governmental activity, such as

flowed by tidal waters, are owned by the State of New Jersey.<sup>80/</sup> A few areas within the Pinelands contain riparian lands. Thus, the first step for any individual or municipality wishing to develop or improve such lands in any way is to buy or lease the land from the state. Any purchase or lease of the tidelands must be approved by the Natural Resource Council.<sup>81/</sup> Although part of DEP, the Council is an autonomous citizen body consisting of twelve citizens appointed by the Governor with the advice and consent of the New Jersey Senate.<sup>82/</sup> DEP may make recommendations to the Council based upon its general Coastal Resource and Development Policies.<sup>83/</sup> If the Council's decision on the sale or lease of riparian lands is inconsistent with DEP coastal policies, the Commissioner of DEP can block the action by refusing to sign the minutes of the Council meeting at which the decision was made.<sup>84/</sup> Although the statute provides recourse for persons aggrieved by the original designation of property as state-owned,<sup>84a/</sup> the State apparently has absolute discretion in determining whether or not to sell or lease riparian lands.<sup>84b/</sup>

After having received a grant or lease from the Natural Resource Council, the potential developer must obtain a Waterfront Development Permit from DEP before any project may begin.<sup>85/</sup> The statute imposes this requirement upon any project

in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water-front development. 86/

Permit applications must include completed standard forms provided by DEP, 87/ a certified legal document evidencing the applicant's right to use or occupy the riparian land, development plans and a location map, a cost estimate, an environmental questionnaire or environmental impact statement, the permit fee, and evidence that application or notice of application has been made to the Army Corps of Engineers and to all required local agencies.

The permit application review process is similar to the process under the Wetlands Act. 88/ DEP's decision will be based upon the policies of its coastal program. DEP may approve, condition, or deny Waterfront Development Permit Applications. 89/ Final DEP decisions may be appealed to the courts.

In Kupper v. Bureau of Navigation, 90/ the court reviewed the appeal of an owner of a riparian grant whose application for a Waterfront Development Permit had been denied by DEP. The proposed project was the construction of a bulkhead that would connect two existing bulkheads in a substantially developed residential area. The court expressed approval of DEP's efforts to preserve ecological balance, but stated that it was equally sympathetic to the

rights of individual property owners who were being deprived of economic use of their land. The court also noted that the trial evidence suggested that the grant of a riparian permit would lead to only a minimal effect on the immediate environment.<sup>91/</sup>

D. Other Agencies Involved In Coastal Programs

Various other agencies of New Jersey government interact with DEP in the administration of coastal management programs. First, the various Divisions of DEP involved with coastal management will attempt to take actions that are consistent with one another and with common coastal management policies to the maximum extent possible. Although this consistency is not required by CAFRA or any other legislation, it is desirable to ensure that decisions by the various Divisions of DEP are coordinated and predictable.<sup>92/</sup>

DEP will work closely with other state agencies as well. The Department of Energy (DOE), for example, must be consulted before any decision is made regarding energy in the state. Thus, DOE must be given an opportunity to comment upon any coastal program permit application pending before DEP.<sup>93/</sup> DEP and DOE have entered into a Memorandum of Understanding in which they agree to work together on plans, policies and guidelines regarding energy facility siting and the coordination of coastal permit applications.<sup>94/</sup>

DEP is also exploring the possibility of a Memorandum of Understanding with the Department of Community Affairs' (DCA) semi-autonomous agency, the Hackensack Meadowlands Development Commission. The agreement would formalize the common goals and objectives of the two agencies and outline a mechanism for resolution of specific conflicts that might arise.<sup>95/</sup>

The DCA and the Department of Labor and Industry (DLI) also participate in the review of CAFRA permit applications. Although not required by law (as is the case with DOE), this participation has been part of DEP's operating practice since the initiation of the CAFRA program.<sup>96/</sup>

DLI's Office of Business Advocacy plays an important role during the pre-application phase of the CAFRA permit process in helping to guide industry to appropriate locations. DLI's new Division of Travel and Tourism, whose goal is to promote the resort and tourism industry of the coast, may also become involved.<sup>97/</sup> Finally, the Departments of Transportation and Agriculture may play important roles in determining the location and operation of transportation and agriculture facilities within the coastal zone.<sup>98/</sup>

E. Local Government Participation

Development in the coastal area is subject to all local regulations as well as to state standards and permits. Thus, a DEP-approved project must still receive appropriate

local approvals before development can begin, and a locally approved project cannot be constructed without receipt of the appropriate DEP permit.<sup>99/</sup> The New Jersey courts have held that DEP may properly deny a CAFRA permit to locally approved projects which are inconsistent with CAFRA or DEP rules and regulations.<sup>100/</sup> On the other hand, the Wetlands regulations specifically state that they do not supersede any local ordinances that impose more restrictive standards.<sup>101/</sup>

DEP has stated that it would seek to increase state-local understanding and minimize conflict by sharing the data generated by the coastal management program and by sharing information on individual project applications.<sup>102/</sup> In addition to sharing documents, DEP has convened and attended meetings in many localities to educate and elicit comment upon the coastal program. Coastal county and municipal groups are included on the Office of Coastal Zone Management's mailing list and receive much relevant information regarding CAFRA.<sup>103/</sup>

DEP has worked closely with the mayors, planning boards and environmental commissions of those municipalities in which CAFRA permit applications have been particularly prominent. In 1977, DEP contracted with the twelve coastal counties to provide DEP with assistance in developing the energy facility siting element of the New Jersey Coastal Program. Finally, DEP further encourages a cooperative

relationship by passing through funds to many of the coastal county planning boards. The counties are to comment on state coastal planning documents, evaluate their consistency with municipal plans and ordinances and comment on specific coastal permit applications.<sup>104/</sup>

#### IV. OTHER NEW JERSEY PERMIT PROGRAMS

Although not as comprehensive in scope as the coastal programs, several other New Jersey permit programs deserve brief mention.

##### A. Water and Sewerage Programs

1. Sewerage Certification in "Critical Areas"  
N.J. Stat. Ann. §58:11-43 et seq.

In 1966, the New Jersey legislature ordered DEP (at that time, the predecessor Department of Health) "to study the various geographical areas of the State [and] determine whether any such areas should be restricted as to the types of sewerage facilities which may thereafter be constructed in such areas."<sup>105/</sup> In conducting the study, consideration was to be given to such factors as soil conditions, ground water table levels, population densities, and projected growth trends.<sup>106/</sup> If the study indicated that restriction or regulation of sewerage facilities was essential to the public health and well-being of an area's inhabitants, that area was to be designated a "critical area for sewerage purpose."<sup>107/</sup>



In 1972, DEP designated as critical areas portions of Monmouth, Ocean, Atlantic and Cape May Counties and those parts of Burlington County adjacent to the Mullica River and its tributaries, lying between any tidal waterway and 10 feet above sea level.<sup>108/</sup> A 760-square mile area of the Pinelands falls within the "critical area" definition.<sup>109/</sup> Thus, no building permits may be issued in such areas until DEP has certified the sewerage facilities for the proposed unit. DEP's water quality standards, adopted pursuant to the New Jersey Water Pollution Control Act<sup>110/</sup> will provide the basis upon which projects are approved or disapproved.

DEP will not review an application until the appropriate local board of health has indicated that they would grant building permit approval.<sup>111/</sup> The applicant-developer must submit to DEP a plan of the proposed realty improvement, results of subsoil and groundwater tests, descriptions of the proposed sewerage facility and water supply system and the expected rate of construction. If the proposed development complies with DEP's water quality standards, it will be permitted.

In the recent case of New Jersey Builder's Association v. Department of Environmental Protection,<sup>112/</sup> the Superior Court of New Jersey considered the designation of the Central Pine Barrens as a critical area and the water quality standards that had been applied to that area.

The court upheld the regulations, finding that they reflected existing water quality values and were supported by adequate data. <sup>113/</sup> The court also affirmed the designation of the Pine Barrens as a critical area:

The statutory permissible critical area designation under attack, which seeks to protect the water quality and the surrounding eco-system in the Central Pine Barrens, will prevent harm to the water and the environment. Hence, it constitutes a valid exercise of police power. <sup>114/</sup>

2. Certification of 50 or More Realty Improvements  
N.J. Stat. Ann. §58:11-25.1 et seq.

This legislation prohibits the grant of a subdivision approval by any municipality or other authority until DEP certifies the water supply and sewerage facilities for the project. The statute only applies, however, to projects involving 50 or more realty improvements (or less than 50 where the subdivision extends into an adjoining municipality or municipalities and will cover 50 or more realty improvements in the aggregate). Realty improvement is defined as a dwelling unit not served by an approved water supply or sewerage facility. <sup>115/</sup>

DEP will not consider applications until the local board of health has indicated that it will grant subdivision approval. <sup>116/</sup> Applicants must submit to DEP a plan of the proposed improvements, results of subsoil and groundwater tests, a description of the proposed water system, the expected rate of construction and an estimated date of

availability of public water and sewers. If the proposal complies with applicable State standards, it will be allowed by DEP.

3. Approval of Water Diversion  
N.J. Stat. Ann. §58:1-18 et seq.

This legislation requires the approval of plans involving the diversion of water from any source for the purpose of establishing a new or additional water supply for "the inhabitants of any municipal corporation or other civil division of the state."<sup>117/</sup> The law applies to all water sources, be they surface, subsurface, well or percolating water.<sup>118/</sup>

Water diversion plans must be approved by the Water Policy and Supply Council (WPSC) which is part of DEP's Division of Water Resources.<sup>119/</sup> WPSC members are appointed by the Governor, with the advice and consent of the state Senate, for four year terms. WPSC consists of 11 members, at least one of whom must be a farmer who derives at least one-half of his income from the production of crops and livestock in New Jersey.<sup>120/</sup> Any WPSC member may be removed by the Governor for cause, upon notice and opportunity to be heard. Vacancies in WPSC are filled by the Governor, with the advice and consent of the Senate,<sup>121/</sup> for the unexpired term. All actions of WPSC are subject to the approval of the Commissioner of DEP.<sup>122/</sup>

Applications for approval must show the sources of the proposed supply and must be accompanied by maps showing the sites and areas of the proposed reservoirs, a plan of the other works proposed to be constructed, the profiles of aqueduct lines and the flow lines of the water when impounded." <sup>123/</sup> The applicant should also include maps, plans and surveys and abstracts of reports relating to them which demonstrate the need for a particular source of supply. The application should also be accompanied by a plan for protecting the new supply and watershed from contamination or a plan for filtering the new supply. Finally, the applicant must submit evidence regarding the character and purity of the water supply proposed to be acquired. <sup>124/</sup>

WPSC must give public notice of and hold a public hearing on all diversion applications. Objections to the application may be filed with WPSC at any time before the hearing. <sup>125/</sup> At the hearing, WPSC must present all arguments in support of and in opposition to the proposed project. WPSC must determine

whether the plans proposed are justified by public necessity, whether they provide for the proper and safe construction of all works connected therewith, whether they provide for the proper protection of the supply and the watershed from contamination or provide for the proper filtration of such additional supply, whether the reduction of the dry-season flow of any stream will be caused to an amount

likely to produce insanitary conditions or otherwise unduly injure public or private interests, and whether the plans are just and equitable to the other municipalities and civil divisions of the state affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply. 126/

A decision on the application must be made within 60 days of the hearing "and with all convenient speed." 127/ WPSC may approve the application as submitted or with such modifications and subject to such conditions as it may deem necessary. Alternatively, WPSC may reject the application entirely, but the statute requires

A reasonable effort to meet the needs of the applicant, with due regard to the actual or prospective needs and interests of all other municipal corporations and civil divisions of the state . . . and the inhabitants thereof. 128/

4. Safe Drinking Water Act  
N.J. Stat. Ann. §58:12A-1 et seq.

In 1977, the New Jersey legislature passed the "Safe Drinking Water Act." That legislation delegated to DEP primary responsibility for enforcement of the Federal Safe Drinking Water Act. Furthermore, the Act authorized DEP "to promulgate and enforce regulations to purify drinking water by filtration or such other treatment method as it may require, prior to the distribution of said drinking water to the public." 129/

The Act specifically directed DEP to establish and maintain a program for the approval of plans and specifications for the design of new or substantially modified public water systems. <sup>130/</sup> The program:

(a) requires all such plans and specifications, or either, to be first approved by the department before any work thereunder shall be commenced and (b) assures that all such projects, upon completion, will comply with any rules and regulations of the department concerning their construction; will be capable of compliance with the State primary drinking water regulations or such requirements of the State secondary drinking water regulations as the commissioner deems applicable, and will deliver water with sufficient volume and pressure to the users of such systems. <sup>131/</sup>

Thus, no public water supply system may be constructed in the State of New Jersey without the approval of DEP.

B. Soil Erosion and Sediment Control Act  
N.J. Stat. Ann. §4:24-40 et seq.

The New Jersey Soil Erosion and Sediment Control Act became law in 1976. The legislative findings in that Act declared that

sediment is a source of pollution and that soil erosion continues to be a serious problem throughout the State, and that rapid shifts in land use from agricultural and rural to nonagricultural and urbanizing uses, construction of housing, industrial and commercial developments, and other land disturbing activities have accelerated the process of soil erosion and sediment deposition resulting in pollution of the waters of the State and damage to domestic, agricultural, industrial, recreational, fish and wildlife, and other resource uses. <sup>132/</sup>

The Act is administered by the State Soil Conservation Committee, which includes both the Commissioner of DEP and

the Commissioner of the Department of Agriculture,<sup>133/</sup>  
and by local soil conservation districts.<sup>134/</sup>

The purpose of this law is to control erosion and sediment during the construction phase of development. The Act requires municipalities to condition their approval of any development "project" upon certification by the appropriate local soil conservation district of a plan for soil erosion and sediment control.<sup>135/</sup> However, municipalities which adopt local ordinances that conform to the soil erosion and sediment standards promulgated by the State Soil Conservation Committee, and obtain Committee approval of those ordinances, are exempt from the certification requirements of the Act. Project is defined as "the disturbance of more than 5,000 square feet of the surface area of land for the accommodation of construction" for which the State Uniform Construction Code would require a building permit.<sup>136/</sup> Single-family dwelling units are not deemed to be projects, however, unless they are part of a proposed subdivision, site plan, conditional use, zoning variance, planned development, or part of a project involving two or more single family dwellings.<sup>137/</sup>

Local soil conservation districts must grant or deny plan certification within 30 days. Failure of a district to grant or deny certification within this period constitutes certification.<sup>138/</sup> The Act directs local

districts to approve plans that comply with state standards promulgated by the State Soil Conservation Committee.<sup>139/</sup>

Alternatively, depending upon the circumstances, the local district may certify the plan subject to certain conditions or deny certification altogether.<sup>140/</sup>

#### IV. GREEN ACRES LAND ACQUISITION PROGRAM

New Jersey's Green Acres Program began in 1961 with the passage of the Green Acres Land Acquisition Act of 1961.<sup>141/</sup> Pursuant to that legislation, the New Jersey voters approved a \$60 million Green Acres bond issue on November 7, 1961.<sup>142/</sup> Thus, New Jersey became the second state in the nation to launch a large-scale open space land acquisition program financed through the sale of bonds.<sup>143/</sup>

In 1971, the New Jersey voters authorized a second Green Acres bond issue, this time in the amount of \$80 million.<sup>144/</sup> The funds authorized by both the 1961 and 1971 programs were used for State land acquisitions and for State matching grants to be used by counties and municipalities in acquiring open space.<sup>145/</sup> A third Green Acres bond issue was approved in a Statewide referendum in 1974.<sup>146/</sup> "Green Acres III" differed in scope from its predecessors in two respects. The third bond authorization amounted to \$200 million. In addition, Green Acres III funds were to be used for the development, as well as



acquisition, of open space sites.<sup>147/</sup>

Of the total \$140 million authorized by the 1961 and 1971 legislation, \$80 million was allocated for land acquisition by the State and \$60 million was marked for State matching grants to assist counties and municipalities in acquiring open space.<sup>148/</sup> The \$200 million bond authorization of 1974 makes available \$50 million to each of the following four categories: State land acquisition, local land acquisition, State recreational development, and local recreational development.<sup>149/</sup>

Grants are made to local units on a matching basis, with Green Acres contributing up to one half the cost of a local project.<sup>150/</sup>

Recreational development program money is available for most public facilities needed for outdoor recreation or conservation: facilities for outdoor games and sports, boating, picnicing, camping, swimming, fishing, hunting, bicycling, nature study, and playgrounds. In some cases Green Acres money may be used for the renovation of existing facilities. Any parcel or parcels that constitute a potential recreation or conservation site may be the subject of the land acquisitions program.<sup>151/</sup>

The legislature provided several guidelines to be followed by DEP in acquiring lands and making grants to local units for land acquisition under the Green Acres program.

DEP is to

(a) seek to achieve a reasonable balance among all areas of the State in consideration of the relative adequacy of area recreation and conservation facilities at the time and the relative anticipated future needs for additional recreation and conservation facilities;

(b) insofar as practicable, limit acquisition to predominantly open and natural land to minimize the cost of acquisition and the subsequent expense necessary to render land suitable for recreation and conservation purposes;

(c) wherever possible, select land for acquisition which is suitable for multiple recreation and conservation purposes;

(d) give due consideration to co-ordination with the plans of other departments of State Government with respect to land use or acquisition. 152/

The legislature added two additional guidelines in the 1971 Act: focus special attention on the provision of open lands in the urban sectors of the State, 153/ and avoid the outright purchase of agricultural lands and acquiring development rights, conservation easements and other less-than-fee interests in lieu thereof whenever feasible. 154/

A DEP Staff Assistant has indicated several other criteria that would be considered in the evaluation of Green Acres projects. Projects that serve recreation and conservation purposes at the same time should be especially attractive to DEP. Furthermore, evaluators would be impressed with projects that provide a wide variety of recreational uses.

It is also important that the project be easily accessible by inexpensive or energy conserving means such as mass transit, bicycling, or walking. Finally, the DEP representative indicated that readiness to begin construction would enhance the prospect of project approval.<sup>155/</sup>

The goal of the Green Acres program is "[t]he provision of lands for public recreation and the conservation of natural resources."<sup>156/</sup> The New Jersey legislature delegated to DEP the responsibility of administering the program and attaining this goal. The several activities that, when taken together, comprise the Green Acres Program, are performed by a number of offices and divisions within DEP and by several other State agencies as well.

DEP's Green Acres and Recreation Program is primarily responsible for Green Acres acquisition and development.<sup>157/</sup> That program includes Offices of Local Grants, Land Acquisition, Tax Exemption, Legal Services, Leases, and Recreation Planning.<sup>158/</sup> DEP's Division of Water Resources operates several reservoir sites that were acquired with Green Acres bond funds. The Division of Fish, Game and Shellfisheries administers many acres of land acquired with Green Acres funds as fish and wildlife management areas. Finally, DEP's Division of Parks and Forestry has been assigned several acres of Green Acres acquisitions which it operates and maintains as parks,

forests, recreation areas, natural areas, marinas and historic sites. <sup>159/</sup>

Other State agencies are also involved in Green Acres activities. The Department of Agriculture advocates the preservation of agriculture as a viable industry in New Jersey and the role of farmlands as open space. DCA's Division of State and Regional Planning has prepared or participated in numerous planning studies that have influenced the Green Acres program. The Law Division in the Department of Law and Public Safety assists in land acquisition activities by handling closings in negotiated settlements and representing the State's interests in the Green Acres program at condemnation proceedings. <sup>160/</sup>

The Green Acres Program can be divided into three sequential components for purposes of analysis: planning, land acquisition and administration. With regard to planning for open space acquisitions, the New Jersey Comprehensive Outdoor Recreation Plan (SCORP) is used by DEP to measure open space adequacy and needs. <sup>161/</sup> This Plan addresses the adequacy of open space for existing and projected demands and examines the accessibility of recreation resources for all segments of the population. In addition to studies regarding recreation needs and uses, SCORP also inventories federal, state, county, municipal and private recreation resources. SCORP's major policies

include an emphasis on open space in urban areas, recreation facility development, the increase of public access to recreation resources by mass transit, and the development of "barrier-free" recreation facilities. <sup>162/</sup>

Green Acres State acquisitions are usually proposed by the State agency that will manage the land after acquisition. <sup>163/</sup> The two major land administration agencies are DEP's Divisions of Parks and Forestry and Fish, Game and Shellfisheries. Local Green Acres acquisition proposals, however, are initiated by New Jersey counties and municipalities. <sup>164/</sup> All Green Acres project proposals are channeled through the DEP Commissioner's Advisory Committee on Open Lands Conservation. <sup>165/</sup> This Committee is composed of the Directors of the five operating Divisions of DEP, five members of the Commissioner's staff offices, the Director of State and Regional Planning and the Secretary of Agriculture. The Committee is to make recommendations and advise the DEP Commissioner on matters of acquisition policy, projects and programming. <sup>166/</sup> After the Committee submits its recommendation for approval to the Commissioner, the Commissioner may approve the project by signing an administrative order authorizing land acquisition within the project area for the purposes stated in the Green Acres legislation. <sup>167/</sup>

After project approval, DEP staff takes over to handle the land acquisition process. DEP's Land Acquisition

Section employs approximately 40 persons who are organized into the following functional groups: appraisals, negotiations, legal services, relocation assistance, accounting and engineering.<sup>168/</sup> The Green Acres Local Matching Assistance Program is part of the Land Acquisition Section for organizational purposes, but functions independently of the State program.<sup>169/</sup>

After project approval, affected property owners are identified and notified. Next, the project property is professionally appraised. The appraisal is reviewed by the Green Acres appraisal staff. Finally, the appraisal process culminates in the arrival at a price which is deemed to be the fair market value of the property in question.<sup>170/</sup>

Meetings are then held with the property owner for the purpose of negotiations. The first meeting is for the purpose of acquainting the property owner with the Green Acres program. The State's offer of purchase is made at a second meeting and additional meetings may be held depending upon whether the property owner wishes to consider offers or make counter-offers. If an agreement is reached, the negotiator secures a signed option or binder agreement. If no agreement can be reached, the Attorney General's office is requested by DEP to file a condemnation action against the owner.<sup>171/</sup> Eventually,

a closing takes place and payment is made. Finally,  
the land is assigned for project administration. <sup>172/</sup>

As mentioned above, DEP's Divisions of Parks  
and Forestry and Fish, Game and Shellfisheries have been  
assigned to administer most of the land acquired through  
the State Green Acres Program. <sup>173/</sup> In the case of local  
acquisitions, the determination regarding administrative  
assignment would naturally be left to the particular  
local government. Lands acquired pursuant to the Green  
Acres Program are eventually to be used for "parks,  
natural and historic areas, forests, camping, fishing,  
water reserve, wildlife, hunting, boating, recreation  
centers, winter sports and similar uses for public recrea-  
tion and conservation of natural resources." <sup>174/</sup>

CHAPTER 10

FOOTNOTES

1. N.J. Stat. Ann. § 13:1D-9 (West 1979).
2. Id.
3. Id. §§ 13:1D-1.
4. Id. § 13:1D-2, 13:1B-2.
5. See the organization chart set forth in Appendix A of this chapter.
6. State of New Jersey and United States Department of Commerce, New Jersey Coastal Management Program 165 (August, 1978) [hereinafter cited as COASTAL PROGRAM].
7. 16 U.S.C.A. § 1451 et seq. (West 1974 & Supp. 1979).
8. COASTAL PROGRAM, supra note 6, at 165.
9. Id. at 171-172.
10. Id. at 172.
11. Id.
12. Id.
13. Id. at 173.
14. Id.
15. Id. at 173-74.
16. 16 U.S.C.A. § 1451 et seq. (West 1974 & Supp. 1979). The Act was extensively amended in 1976 in response to the energy crisis. To a large extent, the amendments related to an additional coastal energy impact program component. See Id. § 1456a.
17. E.g., Finnell, The Federal Regulatory Role in Coastal Land Management, 1978 ABA RESEARCH J. 169, 249 [hereinafter cited as Finnell].



18. 16 U.S.C.A. § 1451(a), (h) (West Supp. 1979).
19. Id. §§ 1454, 1455. The federal law provided more than two-thirds of the funding used by the DEP for coastal planning during 1974-1977. New Jersey Department of Environmental Protection, A Coastal Management Strategy for New Jersey 9 (September, 1977) [hereinafter cited as COASTAL MANAGEMENT STRATEGY].
20. Id. § 1456a.
21. Id. § 1461.
22. Id. §§ 1456(c)(1), (2); 1456(c)(3)(A); 1456(c)(3)(B); 1456(d).
23. Finnell, supra note 17, at 249 & n. 423.
24. 16 U.S.C.A. § 1455(e) (West 1974).
25. Finnell, supra note 17, at 250 & n. 425.
26. COASTAL PROGRAM, supra note 6, at 164.
27. 16 U.S.C.A. § 1454(b)(1)-(9) (West Supp. 1979).
28. COASTAL MANAGEMENT STRATEGY, supra note 19, at 9.
29. The Office of Coastal Zone Management in the DEP's Division of Marine Services is specifically responsible for administration of the CAFRA program. The Office has a 35-member staff. Governor's Pinelands Review Committee, Planning and Management of the New Jersey Pinelands 64 (1979).
30. Id. at 8.
31. New Jersey Department of Environmental Protection, Interim Land Use and Density Guidelines for the Coastal Area of New Jersey 1 (May, 1976) [hereinafter cited as INTERIM GUIDELINES]. See Appendix B for a map of the CAFRA area.
32. N.J. Stat. Ann. § 13:19-19 (West 1979).
33. N.J. Stat. Ann. § 13:19-2 (West 1979).
34. Id.

35. Rivkin & Kinsey, New Jersey: Formulating an Interim Land Use Policy, ENVIRONMENTAL COMMENT 11 (November, 1976).
36. N.J. Stat. Ann. § 13:19-5 (West 1979).
37. Id. § 13:19-3.
38. See DEP Form CP-1 in Appendix C.
39. N.J. Stat. Ann. § 13:19-7 (West 1979).
40. N.J.A.C. 7:7D-2.3(b), (c) (1979).
41. COASTAL PROGRAM, supra note 6, at 169.
42. Id. Copies of the EIS are distributed to the State Departments of Community Affairs, Energy, Labor and Industry, Transportation as well as other divisions within DEP. In addition, the relevant county and municipal planning boards and environmental commissions, soil conservation districts and regional planning agencies receive copies.
43. Kinsey, The Coastal Development Review Process in New Jersey: Avoiding Disputes and Resolving Conflicts, ENVIRONMENTAL COMMENT 19 (May, 1977) [hereinafter cited as REVIEW PROCESS].
44. The hearing is required by statute. N.J. Stat. Ann. § 13:19-9 (West 1979).
45. REVIEW PROCESS, supra note 43, at 19.
46. Id. For a detailed illustration of the CAFRA permit review process, see Appendix D.
47. N.J. Stat. Ann. § 13:19-10 (West 1979).
48. Id. § 13:19-13. See also N.J.A.C. 7:7D-1.1 et seq. (1979).
49. Id.
50. Id.
51. REVIEW PROCESS, supra note 43, at 19.
52. 140 N.J. Super. 135, 355 A.2d 679 (1976).

53. 355 A.2d at 689.
54. N.J. Stat. Ann. § 13:9A-1 (West 1979).
55. Id. The Office of Wetlands Management in DEP's Division of Marine Services is specifically responsible for administration of the Wetlands program.
56. For the purposes of this act the term "coastal wetlands" shall mean any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State of New Jersey along the Delaware bay and Delaware river, Raritan bay, Barnegat bay, Sandy Hook bay, Shrewsbury river including Navesink river, Shark river, and the coastal inland waterways extending southerly from Manasquan Inlet to Cape May Harbor, or at any inlet, estuary or tributary waterway or any thereof, including those areas now or formerly connected to tidal waters whose surface is at or below an elevation of 1 foot above local extreme high water, and upon which may grow or is capable of growing some, but not necessarily all, of the following: Salt meadow grass (*Spartine patens*), spike grass (*Distichlis spicata*), black grass (*Juncus gerardi*), saltmarsh grass (*Spartine alterniflora*), saltworts (*Salicornia Europaea*, and *Salicornia bigelovii*), Sea Lavendar (*Limonium carolinianum*), saltmarsh bulrushes (*Scirpus robustus* and *Scirpus paludosus* var. *atlanticus*), sand spurrey (*Spergularia marina*), switch grass (*Panicum virgatum*), tall cord grass (*Spartina pectinata*), hightide bush (*Iva frutescens* var. *oraria*), cattails (*Typha angustifolia*, and *Typha latifolia*), spike rush (*Eleocharis rostellata*) chairmaker's rush (*Scirpus americana*), bent grass (*Agrostis palustris*), and sweet grass (*Hierochloe odorata*).  
Id. § 13:9A-2.
57. Ross, The Wetlands Act is Working, NEW JERSEY MUNICIPALITIES 32 (Oct., 1978).
58. N.J. Stat. Ann. § 13:9A-4 (West 1979).
59. Id. Continued commercial production of salt hay or other agricultural crops is specifically excluded from the definition, however, Id.
60. N.J.A.C. 7:7A-1.2(d) (1976).
61. Id. 7:7A-1.2(b), (c).

62. Id.
63. A copy of this form is set forth in Appendix C.
64. A copy of this form is set forth in Appendix E.
65. N.J.A.C. 7:7A-1.4, 7:7A-1.6 (1976).
66. Id. 7:7A-1.6(d).
67. Id.
68. Id. 7:7A-1.8.
69. Id. 7:7A-1.5, 7:7A-1.7(a).
70. Id. 7:7A-1.7(b).
71. Id. 7:7A-1.7(c). For a detailed illustration of the Wetlands permit review process, see Appendix F.
72. N.J. Stat. Ann. § 13:9A-6 (West 1979).
73. 161 N.J. Super. 504, 391 A.2d 1265 (1978).
74. 391 A.2d at 1267.
75. Id. at 1270.
76. Id. at 1268.
77. Id. at 1270.
78. 136 N.J. Super. 436, 346 A.2d 612 (1975).
79. 346 A.2d at 613.
80. COASTAL PROGRAM, supra note 6, at 170.
81. Id.; N.J. Stat. Ann. § 13:1B-13 (West 1979).
82. N.J. Stat. Ann. §§ 13:1B-3, 13:1B-10 (West 1979).
83. N.J.A.C. 7:7E-1.1 et seq. (1978).
84. COASTAL PROGRAM, supra note 6, at 170; N.J. Stat. Ann. § 13:1B-13 (West 1979).
- 84a. N.J. Stat. Ann. § 13:1B-13.5 (West 1979).

- 84b. See Atlantic City Elec. Co. v. Bardin, 145 N.J. Super. 438, 368 A.2d 366 (1976).
85. N.J. Stat. Ann. § 12:5-3 (West 1979). This permit program is administered by the Office of Riparian Lands Management in DEP's Division of Marine Services.
86. Id.
87. DEP requires both a completed CP-1 form (reproduced in Appendix C) and a separate application for a revocable Waterfront Development permit.
88. See text accompanying notes 63-68 supra.
89. COASTAL PROGRAM, supra note 6, at 170.
90. DOCKET NO. A-737-71 (unpublished opinion of Appellate Division, decided April 9, 1976).
91. COASTAL PROGRAM, supra note 6, at 304.
92. Id. at 171.
93. COASTAL MANAGEMENT STRATEGY, supra note 19, at 66. For an illustration depicting the interaction of the 3 coastal permit programs, see Appendix G.
94. A copy of the Memorandum of Understanding is set forth in Appendix H.
95. COASTAL MANAGEMENT STRATEGY, supra note 19, at 66.
96. Id.
97. Id. at 66-67.
98. Id. at 67.
99. Id. at 70.
100. Toms River Affiliates v. Department of Environmental Protection, 140 N. J. Super. 135, 355 A.2d 679 (1976).
101. N.J.A.C. 7:7A-1.9 (1976).
102. COASTAL MANAGEMENT STRATEGY, supra note 19, at 69.
103. COASTAL PROGRAM, supra note 6, at 254-55.

104. Id.
105. N.J. Stat. Ann. § 58:11-43 (West Supp. 1979).
106. Id.
107. Id. § 58:11-44.
108. N.J.A.C. 7:9-10.1 (1979).
109. Governor's Pinelands Review Committee, Planning and Management of the New Jersey Pinelands, 140 (1979) [hereinafter cited as PLANNING & MANAGEMENT].
110. N.J. Stat. Ann. § 58:10A-1 et seq. (West 1979).  
See N.J.A.C. 7:9-4.6 et seq. (1978); 7:9-14.6 et seq. (1979).
111. See N.J. Stat. Ann. § 58:11-25 (West 1966).
112. 169 N.J. Super 76, 404 A.2d 320 (1969).
113. Id. at 326.
114. Id. at 331.
115. N.J. Stat. Ann. § 58:11-25.1 (West Supp. 1979).
116. See Id. § 58:11-25 (West 1966).
117. Id. § 58:1-17.
118. Id.
119. Id. § 13:1D-18.1 (West 1979).
120. Id. § 13:1B-49.
121. Id.
122. Id. § 13:1B-50.
123. Id. § 58:1-18 (West 1966).
124. Id.
125. Id. § 58:1-19.
126. Id. § 58:1-20.

127. Id. § 58:1-21.
128. Id.
129. Id. § 58:12A-2 (West Supp. 1979).
130. Id. § 58:12A-4c. (5).
131. Id.
132. Id. § 4:24-40 (West Supp. 1979).
133. See N.J. Stat. Ann. § 4:24-3 (West 1973) for composition of State Soil Conservation Committee. This Committee is in the Department of Agriculture.
134. See N.J. Stat. Ann. § 4:24-7 et seq. (West 1973) for description of local soil conservation districts.
135. Id. § 4:24-43 (West Supp. 1979). The Act also prohibits the issuance of a certificate of occupancy unless the developer has proceeded in compliance with the certified plan.
136. Id. § 4:24-41g.
137. Id.
138. Id. § 4:24-45.
139. Id. §§ 4:24-44, 4:24-41.
140. Id. § 4:24-44.
141. N.J. Stat. Ann. § 13:8A-1 et seq. (West 1979).
142. Id. § 13:8A-18 (historical note).
143. New Jersey Office of Fiscal Affairs, The New Jersey Green Acres Land Acquisition Program, (November, 1975) [hereinafter cited as Green Acres].
144. See "Green Acres Land Acquisition Act of 1971," N.J. Stat. Ann. § 13:8A-19 et seq. (West 1979).
145. Id. §§ 13:8A-17, 13:8A-24, 13:8A-26.
146. See "Green Acres Land Acquisition and Recreation Opportunities Act," N.J. Stat. Ann. § 13:8A-35 (West 1979).

147. Id. § 13:8A-36. The Act appropriated \$60 million.
148. Green Acres, supra, note 143, at 1.
149. Amon, The Green Acres Act of 1974, New Jersey Municipalities 6 (May, 1975).
150. Id.
151. Id. at 6-7.
152. N.J. Stat. Ann. § 13:8A-5 (West 1979).
153. Id. § 13:8A-20.
154. Id. § 13:8A-23e.
155. Amon, supra, note 149, at 7.
156. Id. §§ 13:8A-2(a), 13:8A-20(a), 13:8A-36(a).
157. See New Jersey Department of Environmental Protection, Coastal Management Strategy for New Jersey, 65 (1977).
158. Id.
159. Green Acres, supra, note 143, at 7.
160. Id. at 7-8.
161. Two SCORP plans have been produced: the first was released in 1966 and an updated version was published in 1973.
162. New Jersey Department of Environmental Protection and U.S. Department of Commerce, State of New Jersey Coastal Management Program - Bay and Ocean Shore Segment 173 (1978).
163. Green Acres, supra, note 143, at 42.
164. Id. at 43.
165. See New Jersey Department of Environmental Protection Administrative Order No. Fifteen (September 13, 1971).
166. Id.
167. Green Acres, supra, note 143 at 50.



168. Id. at 47.

169. Id.

170. Id. at 50.

171. Id. at 53-54.

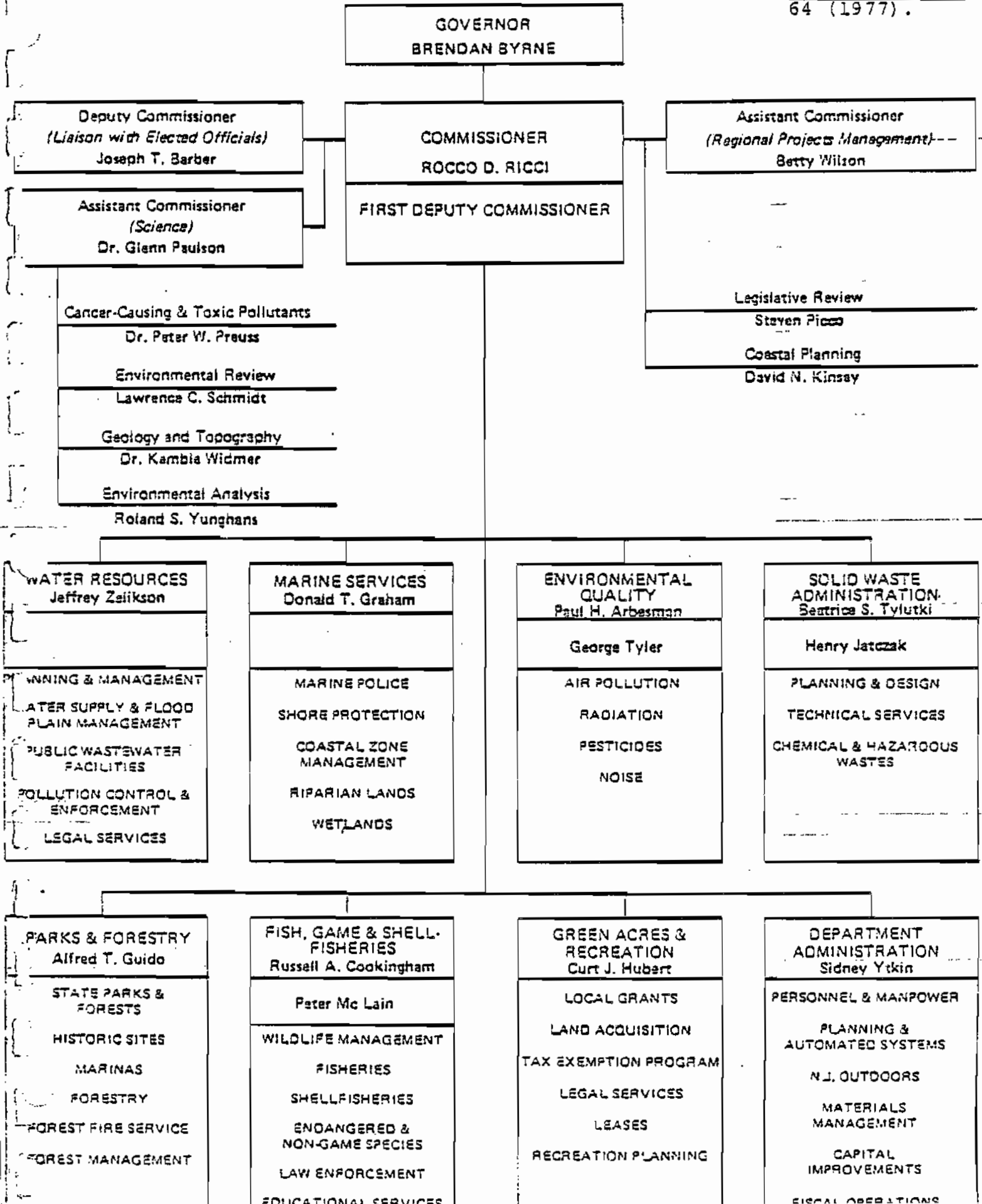
172. For a detailed illustration of the Green Acres Acquisition process, see Appendix I.

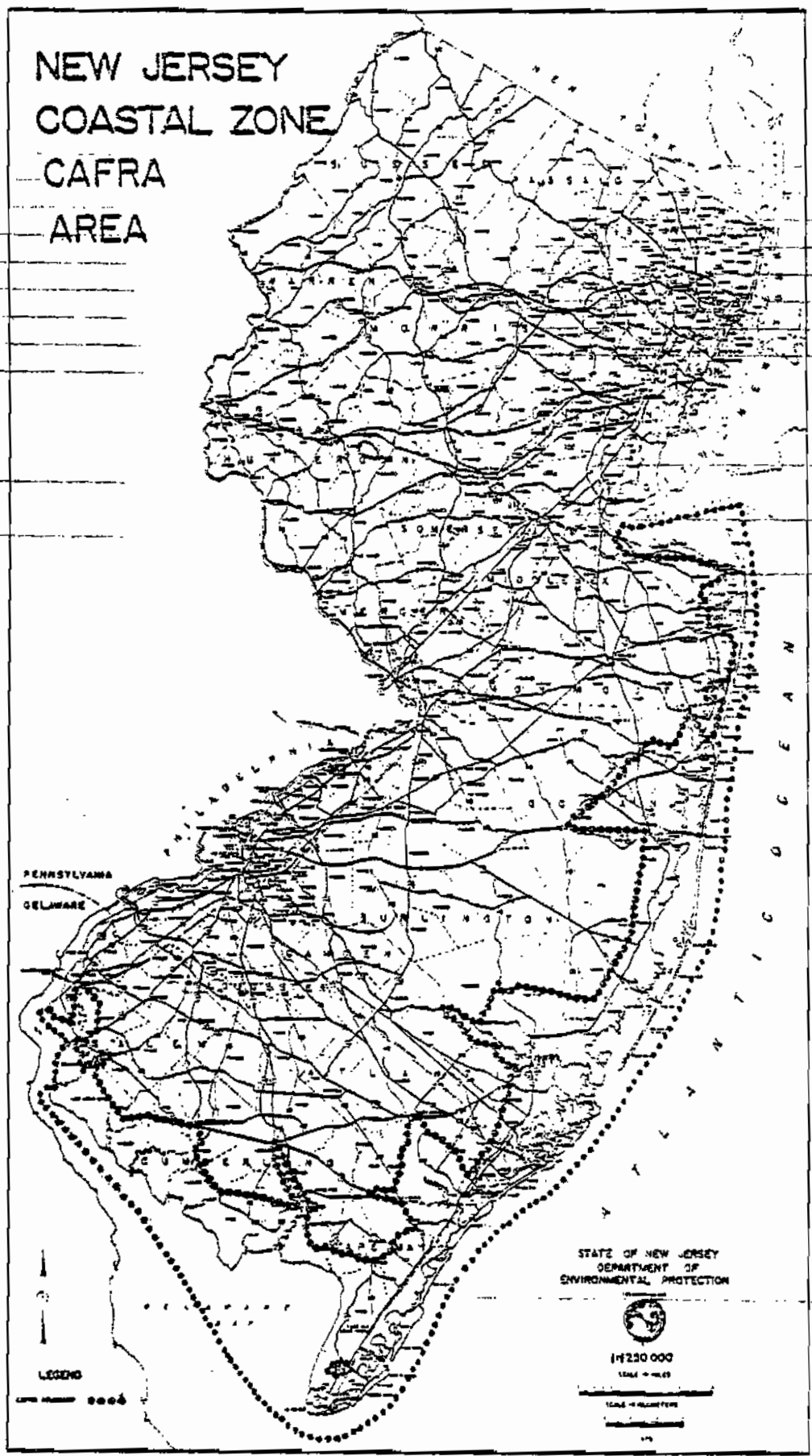
173. Green Acres, supra, note 143, at 61.

174. N.J. Stat. Ann. § 13:8A-21c (West 1979).

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ORGANIZATIONAL CHART AS OF AUGUST 1, 1977

DEP, Coastal  
Management Strategy  
for New Jersey  
64 (1977).





APPLICATION FORM FOR PERMIT

OFFICE USE ONLY

State of New Jersey  
Department of Environmental Protection  
(See Instructions for Appropriate Address)

Agency Project No. \_\_\_\_\_  
Date Assigned \_\_\_\_\_  
Application Fee \$ \_\_\_\_\_  
Date Supplemental  
Information Filed \_\_\_\_\_

PLEASE PRINT OR TYPE

1. Applicant \_\_\_\_\_ Telephone No. \_\_\_\_\_  
Address \_\_\_\_\_  
Permanent Legal Address \_\_\_\_\_

Municipality \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

2. Type of Permit Applied for: (Check only one block - Separate application form and fee is required for each permit.)

Attached is a complete \_\_\_\_\_ permit application.

Check One	All Other Permits	Status or Project Number
<input type="checkbox"/> Sanitary Sewer Facility	_____	_____
<input type="checkbox"/> Stream Encroachment	_____	_____
<input type="checkbox"/> Riparian Wetlands	_____	_____
<input type="checkbox"/> Coastal Area Facility (CAFRA)	_____	_____
<input type="checkbox"/> Other State Permits	_____	_____

3. Location of Work:

Street \_\_\_\_\_  
Lot No. \_\_\_\_\_ Block No. \_\_\_\_\_  
Municipality \_\_\_\_\_ County \_\_\_\_\_

Stream or Waterway (if applicable) \_\_\_\_\_

4. Fee: (Basis for Fee submitted - See Sect. 5. of Rules and Regulations) Indicate how calculated.

\$ \_\_\_\_\_

5. Has an application for this site been submitted before? YES NO

6. If yes, (A) enter previous Agency Project Number \_\_\_\_\_  
(B) previous decision. \_\_\_\_\_

7. I have included certifications of public notifications. YES NO

8. Engineer's Name \_\_\_\_\_  
Address \_\_\_\_\_  
Municipality \_\_\_\_\_ County \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

9. Brief Description of Proposed Project and the Intended Use: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. I hereby authorize:

Name \_\_\_\_\_ Telephone No. \_\_\_\_\_  
Street \_\_\_\_\_  
Municipality \_\_\_\_\_ County \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

to act as my agent or representative in all matters pertaining to my application.

I hereby certify that the information furnished on this application and the attachments are true and have been offered in order to induce the Department to issue the permit which is the subject of same. I am aware that false swearing is a crime in this State and Subject to prosecution.

\_\_\_\_\_  
Signature of Applicant

Sworn before me  
this \_\_\_\_\_ day of \_\_\_\_\_  
, 197 .

\_\_\_\_\_  
Notary Public

I agree to serve as agent for the above-named applicant.

\_\_\_\_\_  
Signature of Agent



Wetlands Maps \_\_\_\_\_

Type  A  B Application

APPLICATION FORM FOR WETLANDS PERMIT

Date \_\_\_\_\_

Department of Environmental Protection  
Division of Marine Services  
Office of Wetlands Management  
P.O. Box 1889  
Trenton, New Jersey 08625

Gentlemen:

Application is hereby made in accordance with the Procedural Rules and Regulations Implementing the Wetlands Order (N.J.A.C. 7:7A-1 et seq) adopted pursuant to the Wetlands Act of 1970, (P.L. 1970, c. 272) for a revocable Wetlands Permit.

1. Applicant

Name \_\_\_\_\_

Address \_\_\_\_\_

Business \_\_\_\_\_

2. Is proposed activity to be conducted by:

Applicant  Contractor

3. Length of time needed to complete work \_\_\_\_\_

4. Estimated cost of construction for which a permit is requested.

\_\_\_\_\_

5. Estimated cost of construction of the total project \_\_\_\_\_

\_\_\_\_\_

6. Other Federal, State and Local Permits or approvals required for the conduct of the proposed activity and the status of each.

Agency	File No.	Status

7. Enclosed herewith and made a part of this application form are the following documents for a Type \_\_\_\_\_ Permit. (See Section 2.0 of Procedural Rules and Regulations to Implement the Wetlands Order.)

TYPE A APPLICATION

Office Use

- 1. A completed DEP Construction Permit Application Form CP-1.
- 2. A permit review fee of one half of one percent ( $\frac{1}{2}$  of 1%) of the cost of construction on wetlands, or a minimum of one hundred dollars (\$100.00) (N.J.A.C. 7:7C-1.5.)
- 3. Two (2) copies of the following attachments:
  - a. Written explanation of the need for the proposed activity and a description of the measures to be taken during and after the completion of the project to reduce detrimental environmental effects.
  - b. A detailed description of all proposed structures, filling and excavation.
  - c. A map showing the location and boundaries of the area of the proposed activity and the specific location of all proposed structures, filling and excavation.
- 4. A list of names and addresses of owners of record of adjacent lots.
- 5. Evidence of applicant's submission of application for, or receipt of all required riparian grants, licenses and permits.



Office  
Use

TYPE B APPLICATION

- 1. A completed DEP Construction Permit Application Form CP-1.
- 2. A permit review fee of one half of one percent ( $\frac{1}{2}$  of 1%) of the cost of construction on wetlands, or a minimum of three hundred dollars (\$300.00) (N.J.A.C. 7:7C-1.5.)
- 3. Five (5) copies of the following attachments:
  - a. A written explanation for the need of the proposed activity, including a future activities plan.
  - b. A map showing the location and boundaries of the area of the proposed activity and the specific location of all proposed structures, filling and excavation.
  - c. A detailed plan of the proposed activity, drawn to an appropriate and uniform scale, indicating the area(s) of existing and proposed fill and excavation, if any; existing and proposed finished elevations; all existing and proposed structures, sewage collection and treatment facilities, and the type of equipment to be used and the means of equipment access to the activity site.
  - d. An Environmental Impact Statement as specified in Section 6.2.
- 4. A list of the names and addresses of the owners of record of adjacent lands.
- 5. Evidence of applicant's submission of application for, or receipt of, all required riparian grants, licenses and permits for the conduct of the proposed activity.
- 6. Return receipts signed by the Army Corps of Engineers (Permits Branch,) Municipal and County, Clerks and Environmental Commissions, acknowledging receipt of a copy of form CP-1.

Applicant understands that regulated activities shall not be engaged in unless and until the Wetlands Permit is delivered and posted prominently at the work site.

Applicant certifies that he is the owner of the land in question, or if he is not, attaches hereto a letter of permission from the owner for the conduct of the proposed activity.

THIS PERMIT IS BEING FILED IN THE NAME OF:

Individual(s) Unincorporated

A Partnership

A Corporation

Signature \_\_\_\_\_ Title \_\_\_\_\_  
(if any)

Signature \_\_\_\_\_ Title \_\_\_\_\_  
(if any)

Signature \_\_\_\_\_

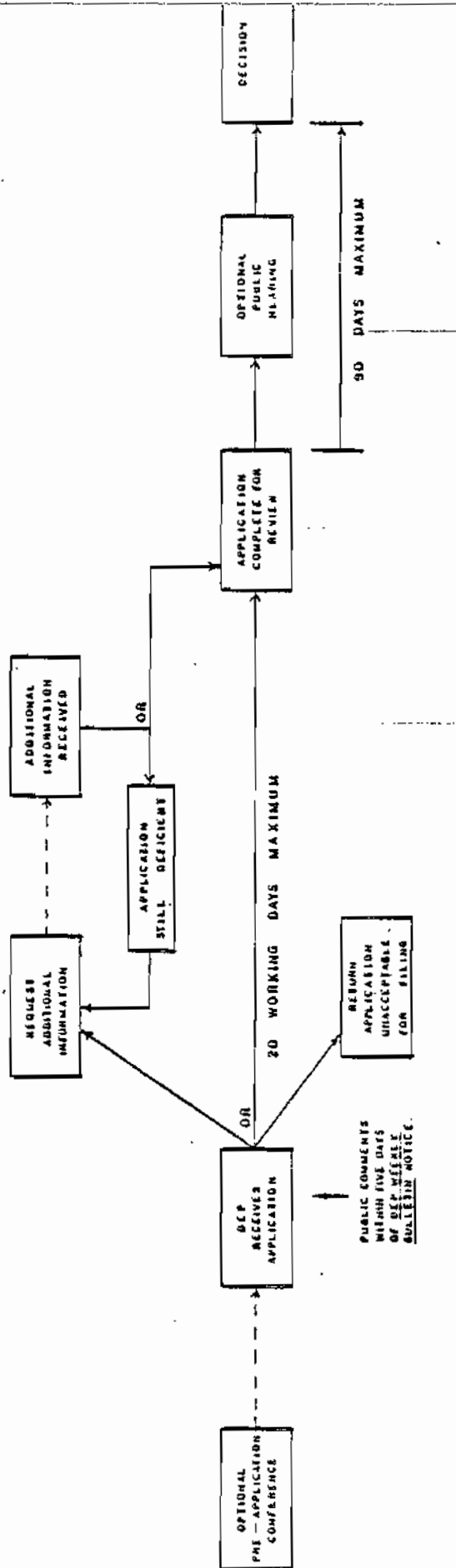
Signature \_\_\_\_\_

Attest: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title)

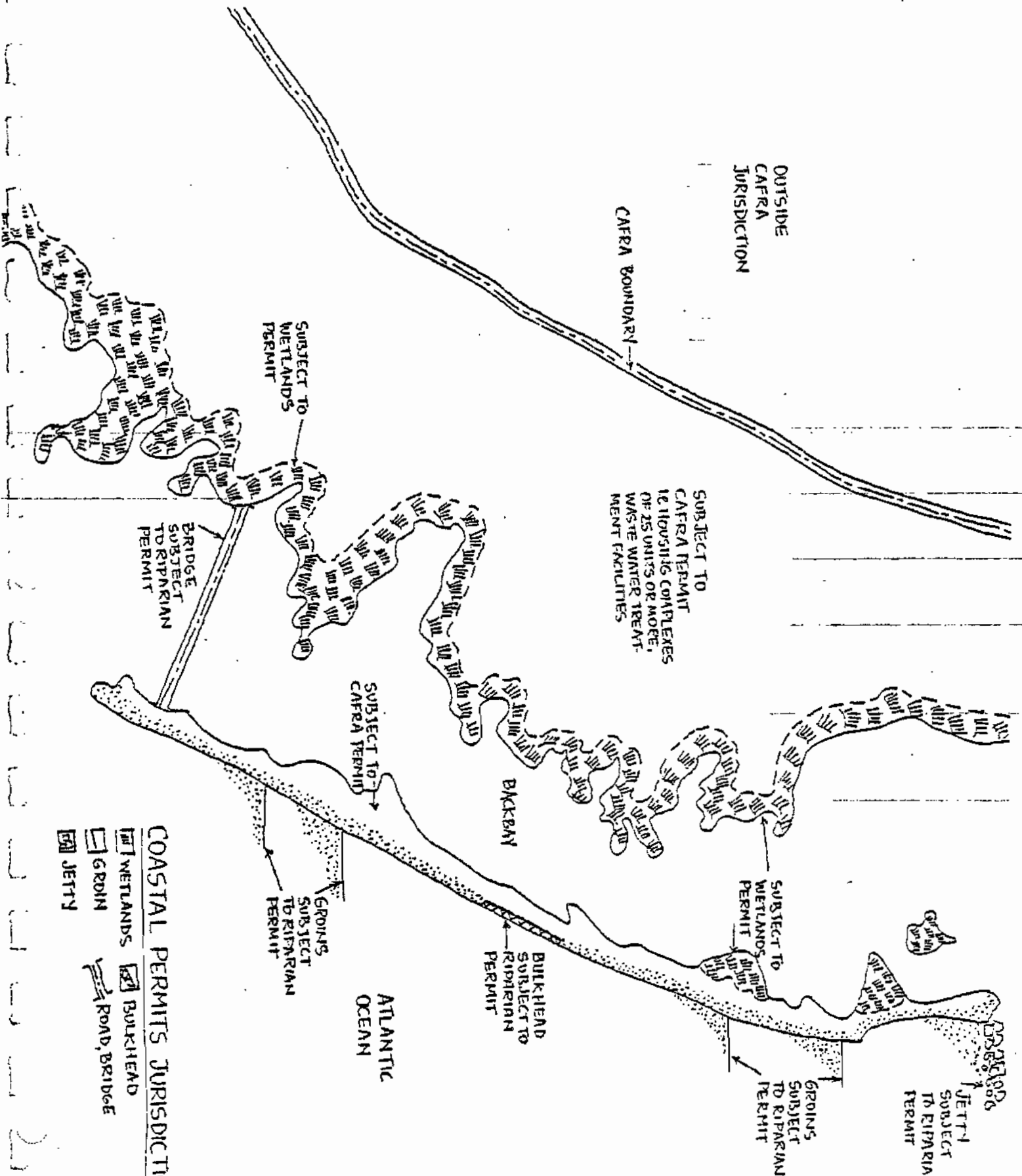
(Place Corporate Seal  
in Space Above)

WETLANDS AND WATERFRONT (RIPARIAN) DEVELOPMENT PERMIT APPLICATION PROCESSES



NOTE: A WATERFRONT DEVELOPMENT PERMIT APPLICATION IS NOT DECLARED COMPLETE FOR REVIEW WITHOUT A LAWFUL RIPARIAN OCCUPANCIAL OR USE INSTRUMENT SUCH AS A RIPARIAN GRANT, LEASE, OR LICENSE.

--- INDICATES THAT THE TIMETABLE IS SET BY THE APPLICANT.



**COASTAL PERMITS JURISDICTIONS**

WETLANDS  
 GROIN  
 BULKHEAD  
 JETTY  
 ROAD, BRIDGE

DEP & U.S. Dept. of Commerce, New Jersey Coastal Management Program: Bay and Ocean Shore Segment 166 (1978).

Memorandum of Understanding  
Between  
New Jersey Department of Energy  
and  
New Jersey Department of Environmental Protection  
on  
Coordination of Permit Reviews

A. Purpose

This Memorandum of Understanding sets forth the areas of responsibilities and operating procedures to be followed effectively immediately by the Department of Energy (DOE) and Department of Environmental Protection (DEP) under the State of New Jersey's coastal management program, as developed and as to be administered under the federal Coastal Zone Management Act of 1972 as amended (16 U.S.C. 1451 et seq.).

The DOE and DEP agree to the procedures and responsibilities that follow, recognize the statutory limitations of both agencies, and do not intend this Memorandum of Understanding to expand or limit their existing statutory powers in any way.

B. Definitions

As used in the Memorandum of Understanding, the following words and definitions shall have the following meanings unless the context indicates or requires another or different meaning or intent.

1. Complete for Review means that supplemental information requested by either the Department of Environmental Protection and Department of Energy on permit applications has been submitted and both agencies are satisfied as to form and content of such information.
2. Energy Report means the report in form and content specified by the Department of Energy Act N.J.S.A. 52:27F-13(c) or as further specified by Administrative regulation of the Department of Energy.
3. Energy Facility means any facility which produces, converts, distributes or stores energy or converts one form of energy to another consistent with applicable statutory authority and regulations of the DOE and DEP.
4. Final Agency Action means a final decision of the Commissioner of Environmental Protection or designated representative on a pending permit application except as noted in Section F.
5. Permits means administrative regulatory instruments issued by the Department of Environmental Protection on the construction or location of energy facilities, under the Coastal Area Facility Review Act (N.J.S.A. 13:19-1 et seq.), Wetlands Act (N.J.S.A. 13:9A-1 et seq.), and waterfront development permit program (N.J.S.A. 12:5-3). The definition of "Permits" may be extended by mutual agreement between DEP and DOE.

C. Statement of Existing Agency Responsibilities

1. The DEP is responsible for formulating comprehensive policies for the conservation of the natural resources of the State, promoting environmental protection, and preventing pollution of the environment (N.J.S.A. 13:1D-9).
2. The DEP is the agency designated by the Governor to develop and administer the State's coastal management program under Sections 305 and 306 of the federal Coastal Zone Management Act.
3. The DEP has selected and presented to the Governor and Legislature the Coastal Management Strategy for New Jersey - CAFRA Area (September 1977) as required by the Coastal Area Facility Review Act (hereafter CAFRA) (N.J.S.A. 13:19-16).
4. The DEP exercises regulatory responsibility over the construction of energy facilities in the coastal zone under three coastal permit programs: the Coastal Area Facility Review Act (N.J.S.A. 13:19-1 et seq.), the Wetlands Act (N.J.S.A. 13:9A-1 et seq.), and waterfront development permit program (N.J.S.A. 12:5-3).
5. The Coastal Area Review Board (hereafter CARB), in but not of DEP, may hear appeals of CAFRA permit decisions by DEP (N.J.S.A. 13:19-13, N.J.A.C. 7:7D-1 et seq.). DEP also provides a plenary hearing appeals procedure complying with the Administrative Procedures Act for CAFRA (N.J.A.C. 7:7D-2.8), Wetlands (DEP Administrative Order No. 12, December 8, 1977), and waterfront development (N.J.A.C. 7:1C-1.9(b)) permit decisions by DEP's Division of Marine Services.
6. The DOE is responsible for the coordinated regulation and planning of energy-related matters in the State (C. 146, L. 1977, N.J.S.A. 52:27F-1 et seq.).
7. The DOE, through its Division of Energy Planning and Conservation, is preparing the State Energy Master Plan for the production, distribution, consumption, and conservation of energy in the State, which will include the siting of energy facilities in the coastal zone (N.J.S.A. 52:27F-12).
8. The DOE, Division of Energy Planning and Conservation is empowered and directed to intervene in any proceeding and appeal from any decision of DEP with respect to the siting of energy facilities in the coastal zone. The DOE is a party of interest in any proceeding before DEP on coastal energy facility siting (N.J.S.A. 52:27F-13(a)).
9. The DOE has coextensive jurisdiction with DEP over permit applications on the siting of any energy facility in the State, including the coastal zone. The DEP must solicit the views of DOE prior to making a decision on the siting of an energy facility in the coastal zone. DOE's views must be transmitted to DEP in a report (hereafter Energy Report) within 90 days of DOE's receipt of the application. If the Energy Report differs from the decision of DEP, the conflict shall be referred for resolution to the Energy Facility Review Board (N.J.S.A. 52:27F-13(c)).

State's participation in the Coastal Energy Impact Program (CEIP) under Section 303 of the federal Coastal Zone Management Act. DEP, as the state coastal management agency, must be involved in the CEIP Intrastate Allocation Process.

D. Coastal Planning and Energy Planning

DOE and DEP agree to work together, to the maximum extent practicable, to formulate, review, and revise plans, policies, and guidelines on the siting of energy facilities in the coastal zone, including but not limited to planning documents such as the State Energy Master Plan, Coastal Management Strategy for New Jersey - CAFRA Area, and New Jersey Coastal Management Program - Bay and Ocean Shore Segment.

E. Joint DEP-DOE Coastal Permit Application Processing Sequence

DEP and DOE agree that coastal permit applications for energy facilities over which DOE has coextensive jurisdiction shall be processed according to the following sequence of steps and timetable.

1. DEP receives energy facility permit application and begins internal DEP permit application review process.
2. When complete for review, DEP promptly refers a copy of the energy facility permit application to DOE, Division of Energy Planning and Conservation for its review. The Division shall submit an Energy Report on the application to DEP within 90 days of DOE receipt of the complete application. The DOE Energy Report shall be transmitted to DEP at least thirty (30) days prior to the application statutory or regulatory deadline for decisions by DEP on CAFRA, Wetlands, or waterfront development permits (see the 90 Day Construction Permits Law, C. 232, L. 1975, N.J.A.C. 7:1C-1.8) in order to insure both timely consideration by DEP of DOE's views as well as expeditious decision-making on energy facility permit applications. The time period may be extended by mutual consent of both agencies and the applicant as deemed appropriate. Consistent with the provisions of the 90 Day Construction Permits Law C. 232, L. 1975, no decision will be made on energy facility permit applications until the DOE Energy Report or a memorandum from the DOE Commissioner that such a report will not be issued, is received by DEP.
3. For CAFRA permit applications, DEP shall request additional information from applicants, as reasonably requested in a timely manner by DOE, prior to declaring an application complete for filing (N.J.A.C. 7:7D-2.3(e)1.), at the required public hearing (N.J.A.C. 7:7D-2.3(e)5.iv.), or within 15 days after the public hearing (N.J.A.C. 7:7D-2.3(e)6.i.), prior to declaring the application complete for review (N.J.A.C. 7:7D-2.3(e)6.iii.), to insure that DOE has adequate information to prepare its Energy Report. At its discretion, DOE may submit a Preliminary Energy Report to DEP at least 15 days prior to the date of a scheduled public hearing on a CAFRA permit application, in order to assist DEP in preparing its Preliminary Analysis of the application (N.J.A.C. 7:7D-2.3(e)4.).

4. For Wetlands and waterfront development permit applications, DEP shall request additional information from applicants, as reasonably requested in a timely manner by DOE, before declaring an application complete (N.J.A.C. 7:1C-1.7(a)2.), to insure that DOE has adequate information to prepare its Energy Report.
5. For proposed coastal energy facilities that require a CAFRA permit and either or both of a Wetlands and waterfront development permit, DEP shall coordinate the review process, including review of the adequacy of submitted information, public hearings, and decision documents, under the auspices of the review process for the CAFRA permit application, including its information requirements. Specifically, a Wetlands or waterfront development permit application shall not be declared complete, triggering the 90 day permit decision period under the 90 Day Construction Permits Law (C. 232, L. 1975), until the CAFRA permit application is declared complete for review (N.J.A.C. 7:7D-2.3(e)6.iii.).
6. DEP issues decision on the energy facility permit application. If DOE has submitted an Energy Report in a timely manner, the DEP decision document shall refer to the Energy Report and indicate DEP's reasons for differences, if any, between the DEP decision and the DOE Energy Report.

F. Appeals of DEP Coastal Energy Facility Permit Application Decisions

DEP's decisions on CAFRA, Wetlands, and waterfront development permit applications may be appealed administratively by an applicant or an interested third party. DOE shall refer a DEP decision that differs with DOE's Energy Report to the Energy Facility Review Board for a decision binding upon DEP. Since multiple possible avenues of appeal exist on DEP coastal energy facility permit applications, DEP and DOE agree that appeals shall be heard according to the following procedure, to be incorporated by appropriate regulations of DEP: the Coastal Area Review Board, the Natural Resource Council and the Energy Facility Review Board.

1. DOE may convene the Energy Facility Review Board only if its Energy Report submitted to DEP differs with the DEP decision.
2. If an applicant and/or an interested third party appeals a CAFRA permit decision to the Coastal Area Review Board, or appeals a CAFRA or Wetlands decision by DEP's Division of Marine Services to the Commissioner for a plenary (quasi-judicial) hearing, or appeals a waterfront development permit decision by DEP's Division of Marine Services to the Natural Resource Council (N.J.A.C. 7:1C-1.9(b)), DOE shall be a party of interest at the appeal. If the final decision on appeal of either the Coastal Area Review Board, Commissioner, or Natural Resource Council differs with the DOE Energy Report submitted to DEP before the initial administrative decision, then DOE shall convene the Energy Facility Review Board.
3. The Energy Facility Review Board may affirm, reverse, or modify the initial DEP administrative decision or the decision on appeal. The DOE and DEP members of the Board agree that DOE shall, by September 23, 1978, promulgate regulations to establish the operating procedures of the Board, including, but not limited to a provision binding the Energy Facility Review Board to limit its review to the DEP decision and the



Energy Report, prepared pursuant to Section G of this Memorandum of Understanding, and to follow the New Jersey Administrative Procedures Act.

4. Appellant parties may seek judicial relief as appropriate.

G. Basis of Energy Report

1. DOE and DEP agree to accept the New Jersey Coastal Management Program - Bay and Ocean Shore Segment (and subsequent segment), as approved by the Governor, and particularly its Coastal Resource and Development Policies, and the State Energy Master Plan, as the basis for the formulation of the DOE Energy Report with respect to the siting of energy facilities in the coastal zone.
2. DOE and DEP agree that the DOE Energy Report shall include an evaluation of the need for the proposed energy facility, considering local, state, regional, and national interests, as one of many factors to be considered in preparation of the Energy Report and decision, respectively.

H. Coastal Energy Impact Program

1. DOE and DEP agree to work cooperatively in DOE's administration of the federal Coastal Energy Impact Program in New Jersey.
2. DEP will participate fully in the New Jersey CEIP Intrastate Allocation Committee's deliberations, as the designated lead state agency for coastal zone management.
3. One copy of all CEIP applications submitted to DOE shall be referred by DOE to DEP for an initial review of the application's compatibility or consistency, as appropriate, with the State's developing or approved coastal management programs (15 CFR 932.26(a)(3), Federal Register, Vol. 43, No. 37 - February 23, 1978, p. 7554).
4. One copy of all final work products and reports prepared with financial assistance under the Coastal Energy Impact Program shall be transmitted to DEP, as a standard condition of CEIP grants passed through to state agencies and units of local governments by DOE.

I. National Interests in Energy Facility Siting

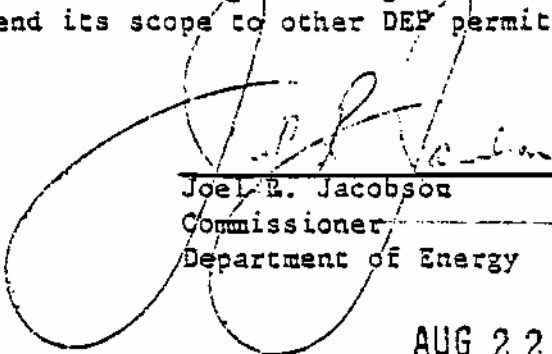
DEP and DOE agree to consider the national interests in New Jersey's coastal zone, as defined in the New Jersey Coastal Management Program - Bay and Ocean Shore Segment, as approved by the Governor, in the DEP permit application processes and the DOE Energy Report preparation process and the DOE State Energy Master Plan. DEP agrees to interpret the opportunity under CAFRA to consider the "public health, safety and welfare" (N.J.S.A. 13:19-4) as sufficient authority to consider these national interests. DOE agrees to interpret its mandate to "... contribute to the proper siting of energy facilities necessary to serve the public interest ..." (N.J.S.A. 25:27F-2) as sufficient authority to consider the national interests in the siting of coastal energy facilities.

J. Federal Consistency

DEP and DOE agree that both agencies shall participate in the State's decision to issue a determination of consistency under Section 307 of the Federal Coastal Zone Management Act for coastal energy facilities. As required by federal regulations (15 CFR 930.18), DEP shall receive, and forward promptly to DOE, all materials necessary for consistency determinations on coastal energy facilities. In the event of a disagreement between DEP and DOE, the Energy Facility Review Board shall be convened and shall make a recommendation to the Governor, who shall make the final determination within the applicable time limit. As required by federal regulations (15 CFR 930.18), DEP will then transmit the final federal consistency determination to the appropriate federal agency.

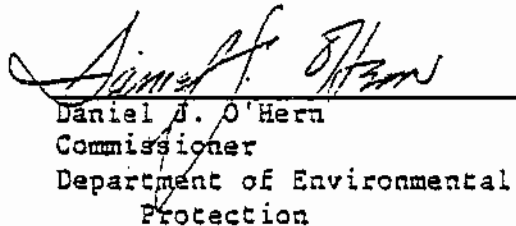
K. Effective Date

This Memorandum of Understanding shall take effect on September 28, 1978. DOE and DEP agree to continue discussions and agree to agree on a revision of this Memorandum of Understanding to extend its scope to other DEP permits.

  
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Joel R. Jacobson  
Commissioner  
Department of Energy

AUG 22 1978

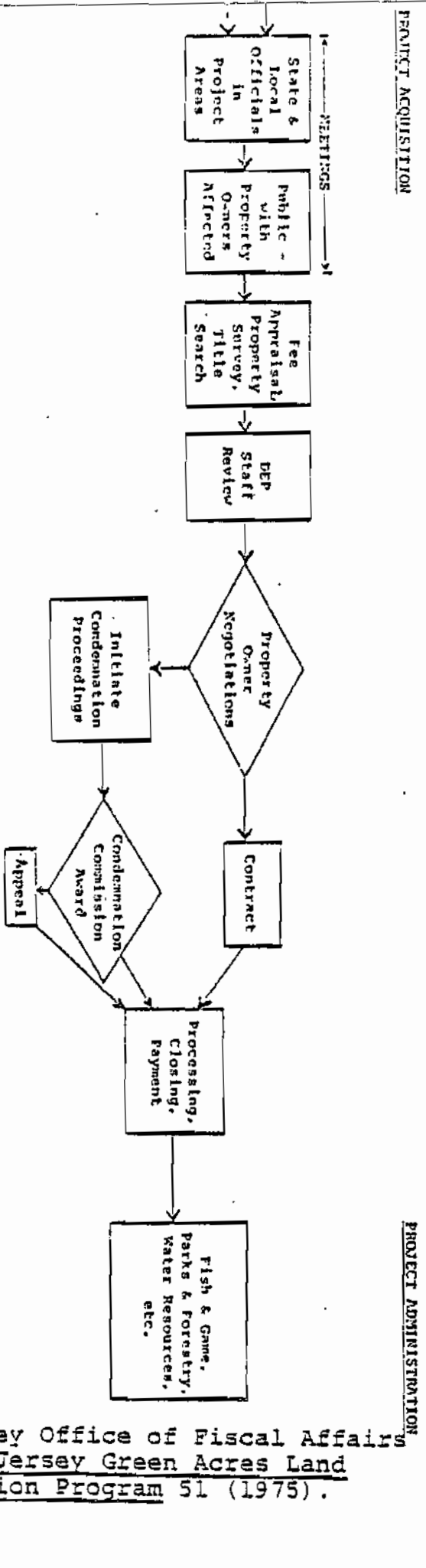
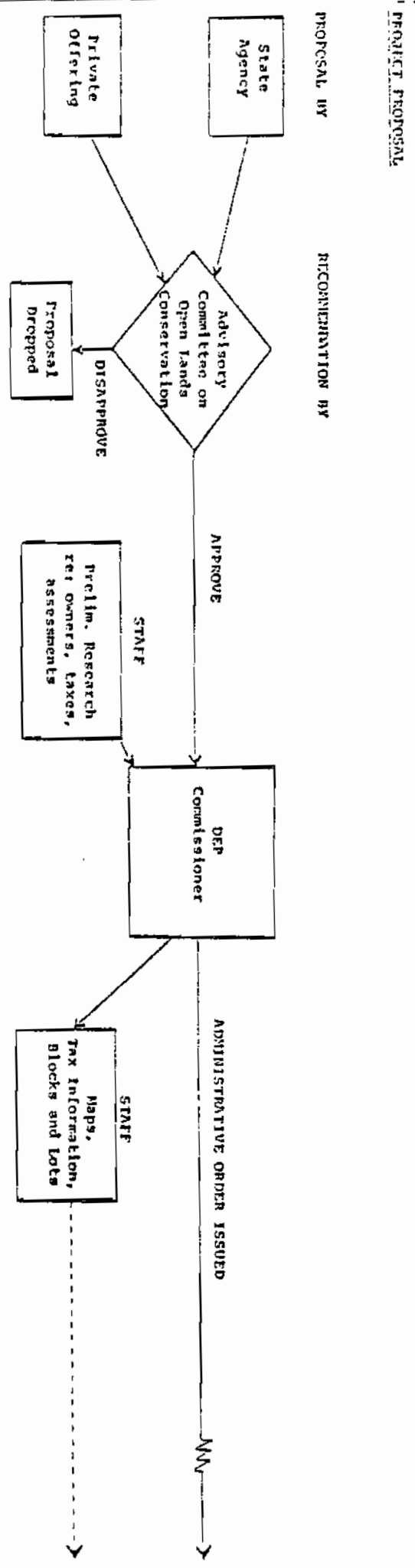
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Daniel J. O'Hern  
Commissioner  
Department of Environmental  
Protection

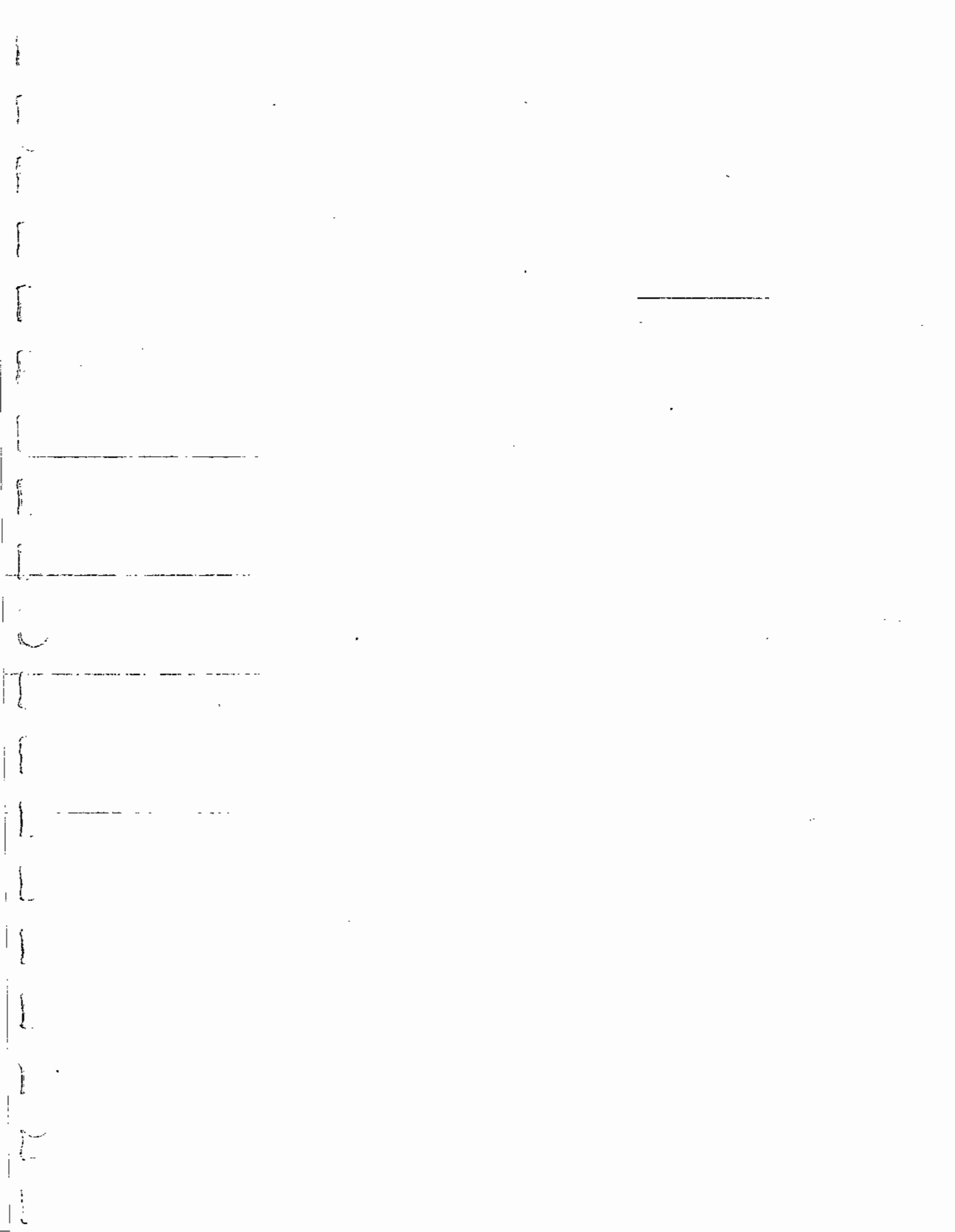
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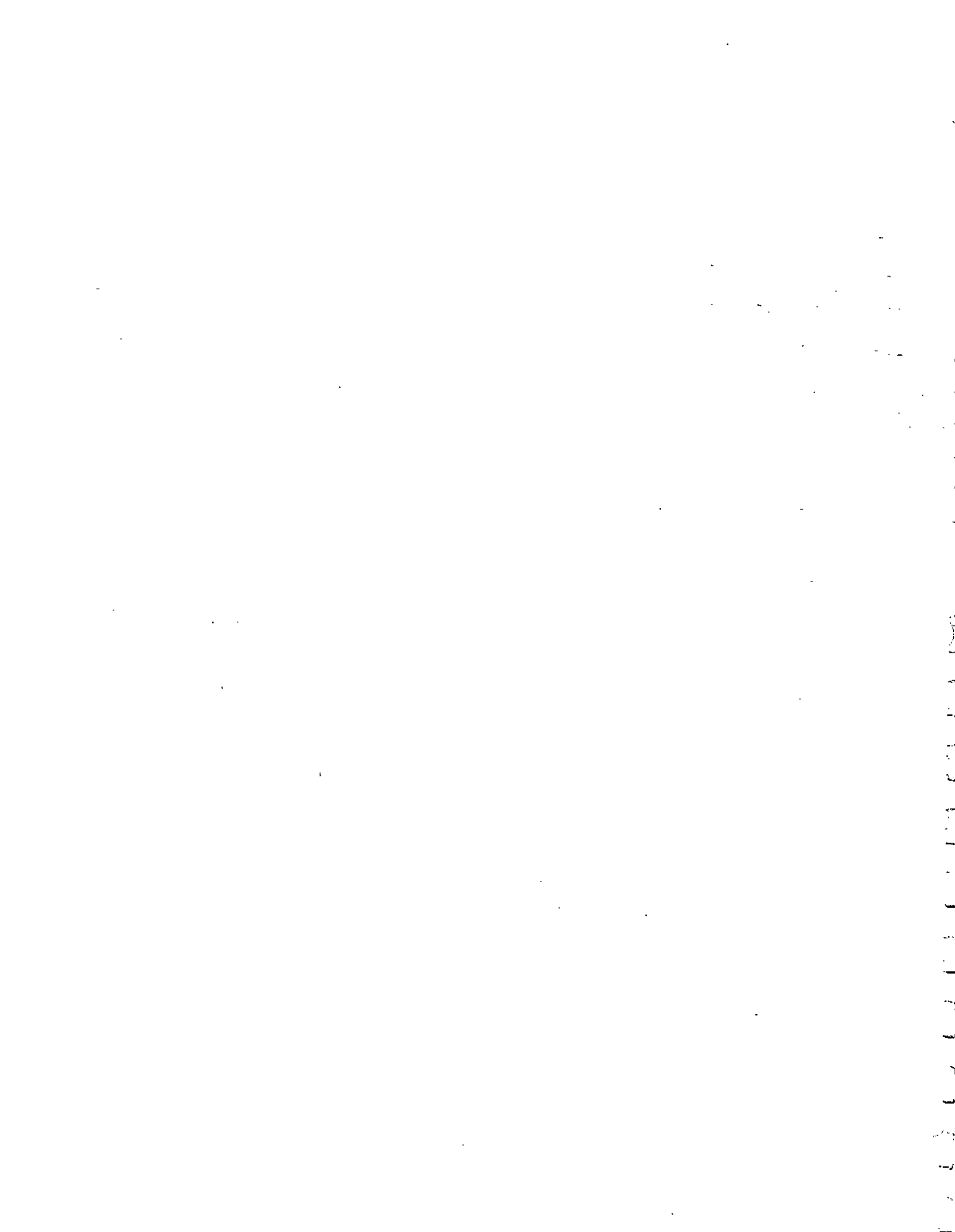
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**SIMPLIFIED GREEN ACRES FLOW CHART:  
STATE ACQUISITION PROGRAM**



New Jersey Office of Fiscal Affairs  
The New Jersey Green Acres Land  
Acquisition Program 51 (1975).





CHAPTER 11

SPECIAL DISTRICTS AND  
INTERGOVERNMENTAL COOPERATION AGREEMENTS

I. INTRODUCTION

This chapter, unlike others in this report, treats a general type of coordination mechanism rather than a specific example of such coordination. While special district governments and intergovernmental cooperation agreements can be viewed as totally dissimilar approaches to governmental coordination, the latter is in many respects a logical outgrowth of the former and thus we treat them together.

II. SPECIAL DISTRICTS

Illinois has long been a leader in the formation of special districts and it has now moved to the forefront of the intergovernmental cooperation movement. Illinois still retains the dubious distinction of having more special governmental units than any other state in the Union.<sup>1/</sup> However, notions of good government and careful planning had little to do with its climb to that position.

The Illinois Constitution of 1870 is often cited as the initial cause of special district development in Illinois. The 1870 Constitution contained limits on local governments' debt and taxation authority which greatly restricted their ability to finance special projects.<sup>2/</sup> When twentieth century demands for greater public services

collided with these constitutional restrictions, special districts flourished. When a local government reached its own five percent constitutional debt limit, a special district, with a single purpose, a separate five percent debt limit and a separate tax levy, was created.<sup>3/</sup>

Other reasons have been given for the creation of special districts in Illinois. For example, many early twentieth century reformers believed that certain governmental functions would be benefited by their removal from local politics and administration by non-partisan officials. Also, several special districts were created in the 1930's in order to qualify for federal aid under various U.S. government programs. Finally, special districts were often created by voters who sought to have taxes raised by the district earmarked for a special function and not diverted to some other purpose.<sup>4/</sup>

As used in Illinois, and many other states, a special district may be defined as a political corporation which has a continuing but indefinite existence, independent of other forms of local government, with limited geographical scope and limited purposes.<sup>5/</sup> Special districts have an infinite variety of structures, powers and functions. The Pinelands Commission itself can be viewed as one form of special district government. It has been said that special districts or authorities in the Eastern states have generally

been created as cooperative efforts of municipal governments, while Midwestern and Western states commonly create special districts with independent property tax levying powers and popularly elected governing boards.<sup>6/</sup>

Special districts are said to have the advantages of flexible boundaries, development of expertise in special district board members and administrators, isolation and clarification of issues, and more direct public participation. However, potential disadvantages of special districts may also be cited. The special district may in some cases be abused as a tax avoidance technique. Special districts can also become inaccessible and unresponsive as the result of a lack of public concern over day-to-day district provision of unspectacular services. Special district residents might in some cases tend to cater to exclusionary and parochial interests.<sup>7/</sup> Perhaps the principal failing of many special purpose districts is, however, the failure of such districts to take sufficient account of general plans, policies and goals in implementing their special charters.

Specific examples of actual implementation of the special district concept are too numerous to relate in total or with great detail. However, several noteworthy examples may be mentioned.

The statutes of Illinois provide for the creation of over 20 distinct types of special purpose districts,<sup>8/</sup>



ranging from advisory regional planning agencies to sanitary districts having broad taxing, bonding and regulatory powers to districts with exceptionally narrow functions such as mosquito abatement. The lesson of Illinois is simply that the special district concept is as limitless as the imaginations and political power of those seeking to use it. It can take any form and be given any power. In implementing its special charter it can have as much or as little power over the general purpose governments with which it interacts as its creators care to give it. It might, however, be noted that one of the powers that is most rare among special districts is the power to control the use and development of private property.

Special districts are not always created directly by state legislation. They are sometimes brought into being by other governmental subdivisions of the state. For example, the Pennsylvania Municipal Authorities Act of 1945<sup>9/</sup> empowers municipalities in that state to create "authorities" by ordinance or resolution. Literally hundreds of special districts have been created pursuant to this statute.<sup>10/</sup> The Act provides that these authorities may be granted powers to sue and be sued, to acquire, hold and dispose of property, to fix and collect charges and rates and to borrow money.<sup>11/</sup> Authority governing boards are appointed by the governing body or bodies of the incorporating municipalities.<sup>12/</sup> The

statute gives to these governing boards "full authority to manage the properties and business of the Authority . . . ." <sup>13/</sup>

The Pennsylvania courts have confirmed that these authorities are independent from the local governments that bring them into existence: "A municipal authority is not the creature, agent or representative of the municipality organizing it but is an independent agency of the Commonwealth." <sup>14/</sup>

In Virginia, "service districts" are planned by district commissions consisting of governmental subdivisions that include at least 25% of the proposed district's population. A service district commission is then elected by referendum. <sup>15/</sup>

Texas, on the other hand, has a wide variety of independent special districts. The special district concept is widely used by real estate developers and subdividers to bring water and sewage services to newly developed areas that have not been incorporated as municipalities. <sup>16/</sup>

Many states have enacted enabling legislation authorizing the creation of improvement districts, one of the broadest forms of special district government. Improvement districts generally perform a considerable variety of governmental functions, as opposed to the typical special district which usually serves a limited purpose. Improvement districts typically perform such functions as water system construction and operation, street paving, sanitary sewer

system construction and operation, garbage collection and fire protection. Two prominent examples of improvement districts are the Estero Municipal Services and Improvement District and the Reedy Creek Improvement District.

The Estero Municipal Services and Improvement District (EMSID) was authorized by special act of the California legislature in 1960. EMSID was to serve as a vehicle for the development of a city and enable the developer to retain control of the land. EMSID possessed many of the powers generally reserved for cities and counties. Pursuant to these powers, EMSID provided such services as: street lighting, sewerage, garbage collection and disposal, water, parks, police and fire protection, and the enforcement of zoning, planning, building and licensing regulations. EMSID was upheld in the California Supreme Court and has been credited "for the success of Foster City and for the developer's being able to make the venture a profitable one."<sup>17/</sup>

Disney World, which is situated in Florida and extends into two counties, was developed under the Reedy Creek Improvement District (RCID). The stated purpose of RCID is to undertake improvements in order to promote favorable conditions for the development of a recreation based community. The uniquely broad powers of RCID include: (1) the ownership, acquisition and disposal of property as

the Board of Supervisors deems necessary; (2) leasing of facilities; (3) eminent domain; (4) reclamation, drainage, irrigation, water, flood and erosion control; (5) installation and operation of the water and sewer systems; (6) ownership, operation and control of the waste disposal and collection system; (7) mosquito control; (8) construction and operation of airport, recreation and parking facilities; (9) fire protection; (10) operation and ownership of public transportation systems and public utilities; (11) the issuance of bonds for roads, bridges and street lighting; (12) the power to adopt reclamation plans; (13) determination over land use controls and planned development; (14) the authority to establish a planning and zoning commission; (15) the ability to participate in federal loan and grant programs; and (16) the power to form contracts. The only power this district appears to lack is the power to provide police protection. RCID's powers may be exercised throughout the entire district, even in portions of the district that overlap municipalities and other political subdivisions. Furthermore, the power of eminent domain may be exercised without as well as within the confines of the district. RCID's Board of Supervisors consists of five members, all of whom must own land within the district, and a majority of whom must reside there or in an adjacent county. Voting power is assessed on the basis of one vote per one acre of

land.<sup>18/</sup>

### III. INTERGOVERNMENTAL COOPERATION AGREEMENTS

Critics of the special district concept point to the fragmentation, duplication, lack of coordination and general unresponsive attitude the technique produces as reasons for limiting its use. However, despite these problems, critics cannot deny that legitimate need frequently exists to deal with a special problem or service on a scale transcending the capabilities and boundaries of general purpose local governments. The drafters of the 1970 Illinois Constitution sought to respond to this dilemma by removing impediments to cooperation between existing general purpose governments. It was hoped that if general purpose governments were given broad power to cooperate with each other in dealing with regional powers, the need for special district governments would be diminished.

Scholarly support for such voluntary cooperation as an answer to fragmented local government has grown significantly in the last decade.<sup>19/</sup> Intergovernmental agreements are said to have "the distinct advantage of being implemented as the result of negotiations by representatives responsive to the electorate." The functional fragmentation which many local governments, including special districts, face is avoided with the intergovernmental cooperation approach because the agreements are negotiated by general

purpose governments whose responsibilities and powers encompass many functions.<sup>20/</sup> The areas of parks, water supplies, sewerage service, libraries, education, hospitals, housing, irrigation, construction, fire and police services, jail services, street construction, repair and maintenance, refuse disposal, health services, recreation programs, tax collection, civil service administration, subdivision regulation, building inspection, airports, transit, and planning and zoning have all been the subject of inter-governmental agreements.<sup>21/</sup>

The Pinelands legislation calls for intergovernmental cooperation to aid in the advancement and implementation of its goals and policies. . Section 2 of the Act, for example, states that adequate protection of the Pinelands area "will require the coordinated efforts of all relevant municipal, county, state and federal agencies." The legislation also directs the Pinelands Commission to include in its Plan a "coordination and consistency component which details the ways in which local, state, and federal programs and policies may best be coordinated to promote [its] goals and policies." Finally, the Act authorizes the Commission to enter "any and all agreements or contracts . . . necessary, convenient, or desirable" for its purposes and to carry out its powers.

Many states currently have scattered throughout their statute books several statutes that authorize inter-governmental cooperation in specified areas. In New Jersey, for example, one statute authorizes contracts between municipalities and sewerage authorities<sup>22/</sup> while another authorizes joint agreements between the governing bodies of municipalities and/or counties for the joint exercise of planning and land use control powers.<sup>23/</sup> Such fragmented authorization for intergovernmental cooperation has been severely criticized. One commentator states that these individual authorizations are but "remedies to cure what in reality are merely specific cases of a recurrent disease -- the inability of governing units, acting alone, to perform adequately their public duties."<sup>24/</sup> Thus, a more comprehensive solution has been called for: one broad general statute<sup>25/</sup> authorizing intergovernmental agreements on a variety of subjects.<sup>26/</sup> Beginning with its 1970 Constitution, Illinois has sought to follow this path.

The Illinois Constitution of 1970 contains a specific provision authorizing intergovernmental cooperation:

(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any

power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

(b) Officers and employees of units of local government and school districts may participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions.

(c) The State shall encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities. 27/

This constitutional language contains "one of the broadest grants of authority for intergovernmental cooperation to be found in the United States." 28/

The constitutional drafters stated that:

[t]he purpose of this . . . section is to provide maximum flexibility to units of local government in working out solutions to common problems in concert with other units of government at all levels . . . . Units of local government will be allowed to exercise their powers and functions with others or to transfer their powers and functions, one to another or others, according to their needs and circumstances. 29/

Thus, Dillon's Rule was to be repudiated, and local governments permitted to initiate and carry out intergovernmental activities at the local level without the need to seek statutory authority from the state legislature. 30/



The Illinois constitutional provision authorizes intergovernmental contracts as well as joint agreements. Although there is disagreement about the practical difference between a joint agreement and contract, commentators agree that there is a theoretical difference between the two. In a joint contract, one party furnishes services to one or more other parties. In a joint agreement, on the other hand, all members, or a board created by them, participate in furnishing service.<sup>31/</sup> Service contracts are generally used in transactions between one or more comprehensive governmental units such as a county (the furnishing unit) and smaller units such as municipalities (the paying/receiving units). Joint agreements, on the other hand, are generally used by parties of equal political rank.<sup>32/</sup>

Three years after the 1970 Constitution was adopted, the Illinois legislature enacted the Intergovernmental Cooperation Act.<sup>33/</sup> The Act is basically a reiteration of the constitutional provision which supplements and clarifies, rather than implements, the constitutional language. Section 3 of the Act, entitled "Intergovernmental Agreements," states that public agencies<sup>34/</sup> may enter agreements to exercise "[a]ny power or powers, privileges or authority exercised or which may be exercised by a public agency of this State."<sup>35/</sup> Section 5 is entitled "Intergovernmental Contracts," and

provides that public agencies may contract "to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform."<sup>36/</sup>

The Act defines "public agency" as "any unit of local government as defined in the Illinois Constitution of 1970, any school district, the State of Illinois, any agency of the State government or of the United States, or of any other State and any political subdivision of another state."<sup>37/</sup> Thus, every unit of government in the nation would appear to be eligible to cooperate with Illinois units of government. Furthermore, the statutory language that authorizes the agreements and contracts, as well as the constitutional provision, indicates that any governmental entity may contract or form an agreement with another governmental entity to perform any function within the power of either entity.

Commentators insist that the potential for inter-governmental cooperation in Illinois is very broad indeed. Despite some restrictive interpretations of the constitutional and statutory provisions by the Illinois Attorney General<sup>38/</sup> and an Illinois Appellate Court,<sup>39/</sup> legal scholars maintain that the Illinois provisions, unlike intergovernmental cooperation authorizations in other states, do not require

mutuality of powers.<sup>40/</sup> The mutuality doctrine would require all parties to a joint agreement or contract to have the power to perform the function that is the subject of the contract or agreement. The constitutional and statutory provisions do not, however, require mutuality. The constitution states that governmental units may "exercise, combine or transfer any power or function . . . ."<sup>41/</sup> The language of the Illinois Intergovernmental Cooperation Act is equally as clear.<sup>42/</sup> Illinois law thus contains potentially vast authority for intergovernmental cooperation.

Illinois municipalities have hardly had time to begin the exploration of the full potential of intergovernmental cooperation. However, our experience in recent years suggests that as local officials begin to understand the breadth of the constitutional and statutory grants, they can be expected to devise more and cooperative programs -- the device apparently has considerable appeal to local governments because it enables them to define with great specificity the extent to which they are relinquishing local power in pursuit of some other goal. Two intergovernmental cooperative ventures have been especially successful in the area of land management and merit brief description here.

The Barrington Area Council of Governments (BACOG)<sup>43/</sup> was established by intergovernmental agreement in April of 1970. BACOG member communities are the Villages of Barrington, Barrington Hills, South Barrington, Tower Lakes, Inverness and Deer Park. These communities are all located in the northeastern corner of Illinois, northwest of the Chicago Metropolitan area.

BACOG's governing board is made up of the village presidents of all member communities. The board is responsible for discussing regional problems, developing, adopting and reviewing plans, and for providing citizen participation. The board is authorized to employ an executive director, an assistant planner and, when needed, a planning consultant.

BACOG is generally responsible for the development of strategies for mutual agreement which are supportive of Barrington area planning goals and objectives. A BACOG spokesman reports that although the organization was initially conceived as a vehicle for land use planning and growth management, it is now engaged in comprehensive and functional planning as well. That representative stated that member communities have been very cooperative; although communities may hold differing views on particular areas, such as housing, they generally come to a consensus with regard to major, overall planning goals.

BACOG is reported to be progressing well toward its objectives. Examples given evidencing this progress were: the adoption of a land use Plan covering the entire 19-square-mile area encompassing the member communities; the development of environmental land use ordinances that were adopted by all but one BACOG member; the undertaking of water supply studies; and boundary agreements that have been entered into by various member communities. A BACOG representative states that the organization has been well received by the public, citing a wide-ranging public information program that involves professional public relations services, frequent appearances before citizens' groups, and a BACOG newsletter.

When asked to comment briefly on the major strengths and weaknesses of the program, BACOG's Director noted the following elements as strengths: the homogeneous socio-economic make-up of all member communities, public awareness of the organization and its purposes, staffing from the inception of the program, and organization at a point in time early enough to "get a handle on" area problems, such as growth management, so that "crisis planning" could be averted. The Director cited the failure of one area community to join the organization and the lack of state initiatives for environmental land use programs as possible weaknesses of the current BACOG program.

The Techny Area Joint Planning Commission was established by formal agreement in 1972. Commission organizers sought to establish a vehicle for intercommunity dialogue in the area of land use and development.

Commission members are the Villages and Park Districts of Glenview, Northbrook and Northfield (northwestern suburbs of the City of Chicago), Northfield Township, and Elementary School District 29. The agreement provides that each participating party is entitled to be represented by one Commissioner. The three member villages, however, are each represented by both their Village Manager and Village President, who both serve as Commissioners. These Commissioners form a governing board which is responsible for the collection, coordination and dissemination of information, and for research, planning and review. The board employs its own staff for assistance in carrying out these functions. The planning staff of each member community contributes planning data, and the Northeastern Illinois Planning Commission serves as a central planning agent who assembles and coordinates planning data collected by the Commission.

Several other area governmental units have participated in Commission meetings and deliberations, although they are not formal participants in the intergovernmental agreement. Those units include area school districts, the

Cook County Forest Preserve District, the Metropolitan Sanitary District of Greater Chicago, and the Soil Conservation Service.

Commission functions include joint land use planning for areas of land adjacent to member governments and rationalization of boundaries and annexation policies. In addition, the Commission supports the acquisition and development of open space and flood retention facilities by the Cook County Forest Preserve District and the Metropolitan Sanitary District of Greater Chicago and works to present a united position on zoning changes for unincorporated land.

The Commission has prepared a formal land use plan, and in 1975, thirteen area units of local government signed the Techny Area Plan Adoption Agreement, adopting the plan and committing themselves to its implementation. The plan contains provisions regarding land use and residential densities as well as municipal, park district and school district boundaries. The plan must be reviewed every three years. A representative of the Techny Commission reports that the 1978 review is still in progress.

A Techny Commissioner recently indicated that the Commission has developed as was contemplated at the time the original intergovernmental agreement was signed in 1972, and that all commission members have been cooperative. Since

the adoption of the Techny Area Plan, however, the Commission has been rather stagnant, reflecting its members' satisfaction with the Plan and with the land use "status quo" in the area. The Techny Commission has been well received both politically and by the general public. When asked about major strengths and weaknesses of the Techny program, the Commissioner replied that the mere fact of harmonious participation by 13 area units of local government should be viewed as the major strength of the program. The Commissioner did express some concern, however, regarding the lack of any test of the Techny "concept" in the courts. It should also be noted that the unincorporated Techny area which is the object of the intergovernmental agreement has not, as yet, come under any significant development pressure.



CHAPTER 11

FOOTNOTES

1. 17 SPECIAL DISTRICTS, note 12, at § [17.10].
2. ILL. CONST. OF 1870, Art. IX, § 12.
3. Anderson & Lousin, From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution, 9 J. MAR. J. PRAC. & PROC. 698, 700-01 (1976).
4. Id. at 701.
5. Juergensmeyer, Special Purpose Taxation Districts: Coming or Going? 11 U. RICH. L. REV. 87 (1976) [hereinafter cited as JUERGENSMEYER].
6. Id. at 88.
7. Id. at 89-91.
8. Id.
9. PA. STAT. ANN. tit. 53, § 301 et seq. (Purdon 1974).
10. ANTIÉAU,  
the Allegheny County Sanitary Authority provides sewage disposal facilities for 69 area communities.
11. PA. STAT. ANN. tit. 53, § 303 (Purdon 1974).
12. Id. § 309.
13. Id.
14. Highland Sewer & Water Authority v. Engelbach, 208 Pa. Super. 1, 220 A.2d 390, 392 (1966).
15. Juergensmeyer, Future Development of Special Districts, in SPECIAL DISTRICTS AND OTHER NON-MUNICIPAL LOCAL GOVERNMENTS IN ILLINOIS, ch. 17, § [17.5] (Ill. Inst. for CLE 1977) [hereinafter cited as 17 SPECIAL DISTRICTS].
16. Id. at § [17.6].
17. See generally Note, New Community Development Districts: A Proposal To Aid New Town Developers, 9 HOUS. L. REV. 1032, 1051-61 (1972). It should also be noted that

improvement districts such as EMSID have drawn criticism. One commentator has stated that the promoters of such districts are "warping and twisting the traditional concept of a special district as a public agency created to effect a public purpose and a public benefit." Willoughby, The Quiet Alliance, 38 S. CAL. L. REV. 72, 79 (1965). Other arguments against this use of the special districts are: (1) they perform essentially a private and proprietary service, with no guarantee of lasting "public interest"; (2) they encourage marginal and speculative projects; and (3) they may spawn urban sprawl. Id. at 78.

18. Note, supra note 17, at 1061-62.
19. See Comment, Interlocal Cooperation: The Missouri Approach, 33 MO. L. REV. 442, 443-44 n. 12 (1968).
20. Kuyper, Intergovernmental Cooperation: An Analysis of the Lakewood Plan, 58 GEO. L. J. 777, 779 (1970).
21. See Merrill, Our Unrealized Resource--Inter-Municipal Cooperation, 23 OKLA. L. REV. 349, 385 (1970).
22. N. J. STAT. ANN. § 40:14A-23 (West Supp. 1979).
23. Id. § 40:55D-77. But cf. N. J. REV. STAT. § 52:14-6.10 to 6.18 (West 1970) (New Jersey "Government Employee Exchange Act of 1967").
24. Merrill, supra note 141, at 351.
25. Intergovernmental cooperation might be authorized in state constitutions as well. E.g., ILL. CONST. at VII, § 10; MICH. CONST. Art. VII, § 28.
26. Many states have patterned such legislation on the Model Interlocal Cooperation Act (See COUNCIL OF STATE GOVERNMENTS, SUGGESTED LEGISLATION--PROGRAM FOR 1957, at 95-97 (1956) for the Model Act. The Illinois version will be discussed infra.) See, e.g., ARK. STAT. § 14-901 et seq. (1968 & Supp. 1975); FLA. STAT. ANN. § 163-01 et seq. (West 1972); KAN. STAT. ANN. § 12-2901 et seq. (1975); KY. REV. STAT. ANN. § 65.220 et seq. (1971 & Supp. 1978); ME. REV. STAT. ANN. Tit. 30, § 1951 et seq. (1978 & Supp. 1979); NEV. REV. STAT. § 277.130 (1973); TENN.

CODE ANN. § 12-801 et seq. (1973 & Supp. 1978);  
UTAH CODE ANN. § 11-13-1 et seq. (1973 & Supp. 1979);  
WASH. REV. CODE ANN. § 39.34.010 et seq. (1972 &  
Supp. 1979). In addition, one commentator has sug-  
gested that, in order to avoid uncertainty and  
confusion, all redundant and conflicting inter-  
governmental cooperation authorizations to specific  
entities be eliminated after passage of the general  
enabling statute.

27. ILL. CONST. Art. VII, § 10.
28. University of Illinois Bureau of Urban and Regional  
Planning Research, INTERGOVERNMENTAL PLANNING 4 (1976).
29. VII Record of Proceedings, Sixth Illinois Constitutional  
Convention 1747-48 (1970).
30. Id. at 1748.
31. Illinois Department of Local Government Affairs and  
Northeastern Illinois Planning Commission, INTER-  
GOVERNMENTAL COOPERATION IN ILLINOIS (1976).
32. Comment, The Illinois Intergovernmental Cooperation  
Act, 1974 U. ILL. L. F. 498, 503-04.
33. Ill. Rev. Stat. ch. 127, § 741 et seq. (1977).
34. See text accompanying note 37; infra.
35. Ill. Rev. Stat. ch. 127, § 743 (1977).
36. Id. § 745.
37. Id. § 742(1).
38. See, e.g., [1974] ATT'Y GEN. OP. NP-712; [1973]  
ATT'Y GEN. OP. NO-637, NP-636.
39. Connelly v. Clark County, 16 Ill. App. 3d 947, 307  
N.E.2d 128 (1973).
40. Froehlich, Home Rule, in ILLINOIS MUNICIPAL LAW ch. 22,  
§ [22.82] (ILL. Inst. for CLE 1978); Comment, supra  
note 32, at 505.
41. ILL. CONST. Art. VII, § 10(a).

42. See text accompanying notes 35-36, supra.

43. The information upon which this review is based was gleaned from two sources:

(a) Illinois Department of Local Government Affairs & Northeastern Illinois Planning Commission, INTER-GOVERNMENTAL COOPERATION IN ILLINOIS (1976).

(b) Telephone conversation with Mr. Don Kline, Director, Barrington Area Council of Governments (January 7, 1980).

44. The information on which this review is based was obtained from two sources:

(a) Illinois Department of Local Government Affairs & Northeastern Illinois Planning Commission, INTERGOVERNMENTAL COOPERATION IN ILLINOIS (1976).

(b) Telephone conversation with Mr. John Eckenrode, Manager, Village of Northfield (Jan. 7, 1980).